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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED AIRLINES, INC.,
Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Tenth Circuit has misapplied the standards of this Court for determining the most appropriate statute of limitations for a claim under Section 43 of the Airline Deregulation Act, 49 U.S.C. app. § 1552 (1988), thereby causing confusion in the circuits not only over the most appropriate statute of limitations for Section 43 claims but also over this Court's state-law and federal-law borrowing principles generally. The questions thus presented are:

1. Whether under this Court's borrowing standards federal courts should borrow a statute of limitations elsewhere in the federal law for claims under Section 43 of the Airline Deregulation Act—a unique federal statute with no precise complement in state law?

2. If state law is the borrowing source, whether under this Court's borrowing standards it would be inappropriate to borrow a state residual statute of limitations for "all actions upon liability created by a federal statute" for Section 43 claims, when such a limitations rule is available in only four states, and its application would significantly interfere with the federal policies at stake in Section 43?

PARTIES TO THE PROCEEDINGS

Petitioner is United Airlines, Inc. Respondents are Paul Hart, Dane Vannice, and Milton Howard.*

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* As required by Rule 29.1 of this Court, petitioner states that its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates consist of UAL Corporation, Mileage Plus, Inc., U-C Corp., Air Wis Services, Inc., Covia Corporation, Cypher Corporation, E & T Trading Corporation, United Airlines Credit Corporation, United Airlines Galileo Holding Company, United Aviation Fuels Corporation, United Cogen, Inc., United Worldwide Corporation, and United Vacations, Inc. Covia Corporation owns 50% equity interest in Covia Partnership, a Delaware general partnership. Covia Corporation also owns 25.6% interest in The Galileo Company Limited, a United Kingdom company.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

United Airlines, Inc. hereby petitions this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 13, 1992.

OPINIONS BELOW

The opinion of the court of appeals, reversing the district court, is reported at 956 F.2d 999 (10th Cir. 1992), and is reprinted in Appendix ("App.") A (1a).[1] The opinion of the district court is unreported, and is reprinted in App. B (17a).

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[1] Citations to material printed in the annexed Appendix appear as "——a".

JURISDICTION

The opinion and judgment of the court of appeals was entered on February 13, 1992. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

Section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1988) (30a).

Sections 8(a)(3) and 10(b) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(3), 160(b) (1988) (36a).

Department of Labor regulations under Section 43 of the Airline Deregulation Act of 1978, 29 C.F.R. § 220 *et seq.* (1991) (41a).

Department of Labor proposed regulations under Section 43 of the Airline Deregulation Act, 44 Fed. Reg. 19146, 19150 (March 30, 1979) (68a).

Colorado Revised Statutes, § 13-80-102(1)(g) (38a), Colorado Labor Peace Act, Colo. Rev. Stat. §§ 8-3-106, -108(1)(a), -110(1), -110(16) (39a), and Colorado Employment Practice Provisions, §§ 24-34-402(1)(a), -403 (40a).

The statutes and regulations involved are reprinted in App. C.

STATEMENT OF THE CASE

This case involves a section of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in non-contiguous sections of 49 U.S.C. app. (1988) (hereinafter "Deregulation Act")) which has been the subject of much litigation in the past few years. It specifically presents two important questions of federal law: (1) whether the federal courts should borrow a statute of limitations from elsewhere in the federal law for claims under a unique federal statute, Section 43 of the

Deregulation Act, 49 U.S.C. app. § 1552 (1988),[2] and (2) if state law is the borrowing source, whether the court of appeals, by borrowing a Colorado residual statute of limitations relating to all actions based on a federal statute, satisfied this Court's longstanding principles for borrowing the most analogous state cause of action.[3]

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[2] Section 43 of the Deregulation Act provides a hiring preference and financial assistance benefits to certain airline employees who lose their jobs during the ten-year deregulatory period. 49 U.S.C. app. §§ 1552(b), (d) (1988).

[3] The Supreme Court has heard only one case under § 43 of the Deregulation Act. In 1987, this Court held that the one-house legislative veto in § 43 was severable from the remainder of the statute. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). In its decision, the Court appeared to acknowledge the availability of a private right of action under § 43, although the issue was not before the Court. *Id.* at 687 n.9 (citing *McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762, 766 (S.D.N.Y. 1986)).

Since *Alaska Airlines* the federal courts have uniformly recognized an implied private right of action in § 43, but they have continued to struggle with other issues left open by Congress, such as: (i) the appropriate statute of limitations for a § 43 claim, (ii) the appropriate remedy for a violation of § 43, (iii) whether a protected employee is obligated to notify an air carrier of his § 43 rights when applying for a job, (iv) what hiring qualifications an air carrier can apply in deciding to accept or reject job applicants who have rights under § 43, and (v) the circumstances where first-hire rights are lost. *See, e.g., Bowdry v. United Airlines, Inc.*, 956 F.2d 999 (10th Cir. 1992); *Haggerty v. USAIR, Inc.*, 952 F.2d 781 (3d Cir. 1992); *Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir. 1991); *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir.), *cert. denied*, 112 S. Ct. 441 (1991); *Long v. Trans World Airlines, Inc.*, 913 F.2d 1262 (7th Cir. 1990); *Robinson v. American Airlines, Inc.*, 908 F.2d 1020 (D.C. Cir. 1990).

Federal courts will continue to struggle with the questions raised in this Petition. While § 43 gives a hiring preference to certain airline employees only if they are "furloughed or otherwise terminated" before October 24, 1988, 49 U.S.C. app. § 1552(d) (1988), these employees may exercise their first-hire rights, unless otherwise extinguished, until the last day the Secretary of Labor is required to make payments under § 43—which under § 43(e) is 72 months from October 24, 1988, or October 24, 1994. 49 U.S.C. app. § 1552(b), (e), (j) (1988). Moreover, given the recent Eastern

This Court has established standards for borrowing a statute of limitations for a federal statute which has none. First, a federal court must determine whether all claims under the federal statute should be characterized uniformly, or whether the claims should be evaluated differently depending upon the factual circumstances and legal theories in each individual case.[4] Second, if the claims under a federal statute should be characterized uniformly, a court must next decide whether state or federal law is the most appropriate borrowing source for the limitations period. In answering this second inquiry, federal courts must consider whether state limitations rules would frustrate or interfere with the federal policies at stake in the federal statute, and whether a federal statute of limitations truly affords a closer fit with the cause of action at issue than does any available state-law source.

The Court of Appeals for the Tenth Circuit misconstrued the nature of the inquiry required at each step. First, in deciding whether claims under Section 43 should be characterized uniformly, the Tenth Circuit erroneously concluded that claims under a federal statute are to be characterized uniformly *only* where the statute " 'encompass[es] *numerous and diverse topics and subtopics.*' " (13a n.6, quoting *Lampf, Pleva, Lipkind, Prupis & Peti-*

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and Pan Am bankruptcies, bills have been introduced in both the Senate and the House of Representatives to extend first-hire rights under § 43(d) to employees who are furloughed or terminated between October 24, 1988 and October 24, 1995. H.R. 3173, 102d Cong., 1st Sess. (1991); S. 1565, 102d Cong., 1st Sess. (1991). Therefore, litigation under § 43 is not likely to come to an end for several years.

[4] A "uniform characterization" does not mean the same time limitation from state to state. Rather, a federal court, for purposes of federal- or state-law borrowing, must first determine whether to characterize all possible claims under a federal statute in a uniform way because of the federal interests in predictability and judicial economy. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991).

grow v. Gilbertson, 111 S. Ct. 2773, 2779 (1991) (citations omitted; emphasis in original).) *Finding that* Section 43 encompasses only one type of claim (i.e., a failure to hire), the court of appeals believed that its "borrowing" inquiries were at an end and that it "must find in each *state* the statute that is 'most analagous.'" (13a n.6 (emphasis added).)

Given its incorrect assumption, a view that is not supported by judicial precedent, the Tenth Circuit failed to analyze whether the limitations period should be derived from a federal source instead of a state statute of limitations. The court of appeals did not accord any weight, let alone discuss, the federal policies at stake in Section 43, the multi-state nature of a Section 43 claim, and whether application of state limitations rules would significantly interfere with federal policies.

Not surprisingly, the Tenth Circuit's perfunctory analysis leaves the circuits divided over whether to adopt an analogous federal or state limitations period for Section 43 claims. In decisions issued only ten months apart, the Third Circuit joined the majority of district courts in borrowing a federal statute of limitations for Section 43 actions, while the Tenth Circuit now joins the Second and Ninth Circuits in borrowing state law. Based on an analysis of the policies at stake in Section 43, and the multi-state nature of the claims, the Third Circuit concluded that state limitations periods significantly interfere with the important federal policies at stake in Section 43. Relying on this Court's decisions which have approved federal-law borrowing in certain circumstances, the Third Circuit borrowed a six-month limitations period for an unfair labor practice charge for discriminatory hiring under Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b) (1988). The Third Circuit and a majority of the district courts have found a far closer fit between Section 43 and an unfair labor practice under the NLRA than between Section 43 and any state-law cause of action.

With regard to the second issue presented in this Petition, the Tenth Circuit mechanically borrowed a state residual limitations period for "all actions upon liability created by a federal statute." Colo. Rev. Stat. § 13-80-102(1)(g). In reaching this conclusion, the Tenth Circuit disregarded the fundamental state-law borrowing principles of this Court which require federal courts to borrow the limitations rule for the most analogous state *cause of action* similar to the federal cause of action at issue.

This Court's intervention is necessary to resolve the confusion in the circuits and to reinforce to the federal courts the proper analysis for borrowing limitations periods. Because the Tenth Circuit's ruling is in conflict with decisions of this Court and other circuits, and raises important questions of federal law and for the airline industry generally, it warrants examination by this Court.

A. Factual Background

On September 8, 1989, plaintiffs-respondents Paul Hart, Milton Howard, and Dane Vannice (collectively "Respondents"), were joined as plaintiffs in a lawsuit that had been filed in the United States District Court for the District of Colorado against petitioner United. Respondents, along with the other plaintiffs in this lawsuit, allege that they are "protected employees" under the Deregulation Act, which means employees who as of October 24, 1978, had at least four years of employment with an airline then certificated by the Civil Aeronautics Board ("CAB"). 49 U.S.C. app. § 1552(h)(1) (1988). They allege that United violated Section 43 by rejecting their applications for employment.

Each of the fourteen plaintiffs in this lawsuit were formerly employed by Frontier Airlines ("Frontier"), which declared bankruptcy in August 1986. On October 17, 1986, the bankruptcy court approved the Frontier-

Continental Job Preservation and Litigation Settlement Agreement (the "JPA"). The JPA was an agreement between Frontier, its parent People Express, Inc., Continental Air Lines, Inc. ("Continental"), and the Frontier unions representing the plaintiffs in this lawsuit, including Respondents and other Frontier union employees. The JPA required Continental to take certain action in connection with its acquisition of Frontier's assets. Under the JPA, each of the Frontier employees, including Respondents, was given the option to obtain employment with Continental in their occupational specialties based upon the availability of vacancies and their relative seniority or to accept cash and/or flight passes in lieu of an employment opportunity.[5] Some of the plaintiffs in this lawsuit, but not Respondents, accepted the opportunity to obtain employment with Continental. Respondents chose to accept cash and/or flight passes, thereby refusing an employment opportunity with Continental.[6]

Beginning in November 1987, each of the Respondents sought ground support positions with United that were similar to positions they held at Frontier. Hart submitted an application for employment to United on November 9, 1987. Howard and Vannice waited until March 1988 to submit an application for employment to United. Each of the Respondents then waited until September 8, 1989 to commence an action against United in which they alleged that the air carrier had violated Section 43 of the Deregulation Act by failing to hire them.

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[5] Continental is one of the air carriers covered by § 43 of the Deregulation Act. 29 C.F.R. § 220, App. I (1991) (57a).

[6] In an opinion letter, the Department of Labor concluded that Frontier employees who accepted a job with Continental lost their first-hire rights under § 43. The Department of Labor never addressed the case of Respondents, however, who rejected employment at Continental and, instead, obtained benefits that they believed were more advantageous than employment with another air carrier covered under Section 43.

B. Statutory Background

In 1978, when Congress passed the Deregulation Act mandating the phase-out of economic regulation of domestic aviation, Congress predicted that deregulation would increase airline industry employment overall. S. Rep. No. 631, 95th Cong., 2d Sess. 113, 115 (1978) (hereinafter "Senate Report") (59a). At the same time, Congress recognized the possibility that some employees might lose their jobs as a direct result of the Deregulation Act. *Id.* at 113. As "insurance" against this contingency, it enacted Section 43 which authorized certain benefits for protected employees.

Section 43 provides two closely linked components of employee protection. First, if an air carrier experienced severe work force contractions or bankruptcy as a result of the Deregulation Act, its furloughed or terminated protected employees were entitled to monthly assistance payments and other monetary benefits from the federal government. *See* 49 U.S.C. app. § 1552(a), (b), (c) (1988). As the second part of the program, selected airlines (*i.e.*, CAB-certificated carriers as of October 24, 1978) have to give a hiring preference to qualified protected employees who are terminated by other certificated carriers. *See* 49 U.S.C. app. § 1552(d) (1988). The right of first-hire component was intended to complement the financial assistance component by making new jobs available to protected employees, thereby "decreas[ing] the cash payments required under the program." Senate Report at 115-16.

Since Congress was uncertain about the need for and the dimensions of an employee protection program in an act whose purpose was deregulation,[7] it failed to provide

[7] There is support in the legislative history for the proposition that Congress did not believe that the program would be necessary, and that the provision was included as a "contingency" to address a "theoretical possibility." Senate Report at 113-15. Subsequently, Congress elected not to appropriate any funds for the financial

a mechanism for enforcement of Section 43 or a time limit for bringing claims.

C. Proceedings Below

On September 8, 1989, Respondents joined as parties in a lawsuit brought by former employees of Frontier in the United States District Court of Colorado. On June 7, 1990, United filed a motion for summary judgment seeking, *inter alia*, dismissal of Respondents' claims on the grounds that their claims were time-barred and that they were not eligible for first-hire rights under Section 43 because they had not accepted employment at Continental.

In a written opinion issued January 18, 1991, the district court (Judge Daniel B. Sparr) held that a six-month statute of limitations applied to any claim under Section 43. The district court recognized that its task was to apply the "most closely analogous statute of limitations." (24a-25a.) Applying this Court's borrowing standards, Judge Sparr recognized that Colorado's residual limitations period for claims based upon all federal statutes "is not most analogous to the [Deregulation Act] and is thus inapplicable." (25a.) Instead, Judge Starr found that two Colorado state statutes were the most analogous to Section 43 claims: Colo. Rev. Stat. § 8-3-110(16) (six-month limitation period for unfair labor practices from the Colorado Labor Peace Act) and Colo. Rev. Stat. § 24-34-403 (six-month limitation period for a discriminatory refusal to hire from the Colorado Employment Practice Provisions). (25a.)[8] The district court also held

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assistance component of the program. *See Alaska Airlines*, 480 U.S. at 681.

[8] The district court said that it need not decide whether a federal limitations rule would be more analogous to § 43 claims. The two Colorado causes of action analogous to § 43 contained the same time limitations period as the federal time limitation United had proposed —the six-month rule for unfair labor practices in the NLRA, 29 U.S.C. § 160(b) (1988). (24a.)

that Respondents lost their designated status as protected employees entitled to a first-hire right as of the date they rejected employment opportunities with Continental and, instead, elected to receive either a cash payment and/or airline passes pursuant to the JPA. (21a.)

On February 13, 1992, the court of appeals reversed both rulings. The Tenth Circuit held that the district court should have applied Colorado's two-year residual statute of limitations for "'[a]ll actions upon liability created by a federal statute where no period of limitation is provided in said statute.'" (14a, quoting Colo. Rev. Stat. § 13-80-102(1)(g).) The court of appeals also held that Section 43 does not require protected employees to accept employment opportunities with other certificated carriers. (10a.)

REASONS FOR GRANTING THE WRIT

This case presents questions of fundamental importance under federal law affecting the airline industry generally. Congress added Section 43 to the Deregulation Act in 1978 to provide temporary assistance to dislocated airline employees to help them find employment *quickly* in their occupational specialties. Senate Report at 116. The Tenth Circuit opinion, however, rewrites Section 43 by allowing Respondents to reject an employment opportunity with an air carrier, Continental, wait one year to apply to another air carrier, United, and delay filing a lawsuit against United for up to two years after they are not hired by United.

As argued in Part I below, a single statute of limitations borrowed from federal law is far better suited to promote the federal policies of Section 43, to prevent forum shopping, and to avoid continuing litigation over the collateral issue of which statute of limitations applies to a Section 43 claim. As the Third Circuit and a majority of district courts have held, an unfair labor practice charge for discriminatory hiring under the NLRA,

which is governed by a six-month limitations period, is a far closer analogy to Section 43 and the source from which the limitations rule ought to be borrowed.[9]

As argued in Part II below, this Court has long held that in looking to state law, a court must borrow the limitations period from the "most analogous" state *cause of action*, so long as the limitations rule is not inconsistent with the federal policies at stake in the federal statute. Ignoring this Court's "borrowing" standards, the Tenth Circuit adopted a state residual limitations rule for *all* actions created by a federal statute. Such a state rule, given its scope, cannot possibly embody the federal policies at stake in Section 43, a unique creation of federal law.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE A SPLIT IN THE CIRCUITS CONCERNING AN ISSUE WHICH HAS A SIGNIFICANT IMPACT ON THE FEDERAL POLICIES EMBODIED IN SECTION 43 OF THE DEREGULATION ACT AND HAS BEEN THE SUBJECT OF MUCH RECENT LITIGATION

A. The Decision Below Conflicts With Decisions Of Other Circuit Courts of Appeals

The circuit courts of appeals have reached directly conflicting answers to the question of whether a federal or state statute of limitations should be applied to Section 43. The Third Circuit and a majority of district courts [10]

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[9] Although Congress has passed the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5114, 28 U.S.C. § 1658, thereby filling the interstices in federal law by the enactment of a four-year statute of limitations, the Act applies only to legislation passed after 1990.

[10] *See Bowdry v. United Airlines, Inc.*, Case No. 88-S-1997 (D. Colo. 1991), *rev'd*, 956 F.2d 999 (10th Cir. 1992); *Haggerty v. USAIR, Inc.*, No. 90-474 (W.D. Pa. 1991), *aff'd*, 952 F.2d 781 (3d Cir. 1992); *Bigelow v. Hawaiian Airlines, Inc.*, 696 F. Supp. 1356,

have held that a single federal statute of limitations would better serve the purpose of Section 43. The Tenth Circuit has now joined the Second and Ninth Circuits in holding that state law should be the source of the limitations period.

The conflict is graphically demonstrated in the split between the Tenth and Third Circuits. The Tenth Circuit below turned to state law as the source for the limitations period, reasoning that the practice of the federal courts is to borrow a limitations period from state law. (11a.) In turning to state law, however, the court of appeals failed to discuss the federal policies at stake in Section 43, whether or not state rules would frustrate or interfere with these federal policies, and whether or not a federal statute provided a closer analogy to Section 43 than any state-law alternative. The Tenth Circuit mechanically borrowed a Colorado residual rule to fill the gap left by Congress in Section 43—a statute, the court of appeals acknowledged, where Congress had left "much of the legislative task undone." (11a, n.5.)

Only six weeks earlier on January 2, 1992, the Third Circuit, reviewing the same provision of the Deregulation Act, came to the opposite conclusion. In *Haggerty v. USAIR, Inc.*, 952 F.2d 781 (3d Cir. 1992), the court of

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1359 (D. Hawaii 1987); *Gonzalez v. Aloha Airlines, Inc.*, 669 F. Supp. 1023 (D. Hawaii 1987), *rev'd*, 940 F.2d 1312 (9th Cir. 1991); *cf. Punahele v. United Air Lines, Inc.*, 743 F. Supp. 758, 759-60 (D. Colo. 1990) (applying six-month statute of limitations under Colorado state law or the NLRA). Only two district courts have adopted the ad hoc approach of borrowing state statutes—reaching different conclusions regarding the most analogous state-law rule. *See Crocker v. Piedmont Aviation, Inc.*, 696 F. Supp. 685, 690-92 (D.D.C. 1988) (applying three-year D.C. catch-all statute of limitations to claim for backpay), *rev'd on other grounds*, 933 F.2d 1024 (D.C. Cir. 1991); *McDonald v. Piedmont Aviation, Inc.*, 695 F. Supp. 133, 138 (S.D.N.Y. 1988) (applying three-year tort statute of limitations), *aff'd*, 930 F.2d 220 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 441 (1991).

appeals recognized that its task was to "first ascertain if a uniform statute of limitations is necessary and, if it is, analyze the federal policies at stake in order to determine whether we should borrow a federal or state statute." *Id.* at 785. Given the important federal policies embodied in Section 43 and the multi-state industry it covers, the Third Circuit held that Section 43 would best be served, first, by characterizing all claims under the statute uniformly, and, second, by adopting a single statute of limitations borrowed from an analogous federal labor law. *Id.* The Third Circuit recognized that the goal of Section 43—to create a speedy and effective mechanism to assist a specific group of airline employees—"would be obstructed if there were uncertainty over the collateral matter of the applicable statute of limitations." *Id.* at 786. The court found that Section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1988), which provides a six-month statute of limitations for unfair labor practice charges, provides a close analogy. 952 F.2d at 787. The Third Circuit explained that the "very transitory nature" of Section 43 "suggests the inadvisability of a statute of limitations that would far outlast the effective date of the program." *Id.* at 788.[11]

Two other circuits have borrowed a statute of limitations from state law in Section 43 actions, although neither

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[11] The Third Circuit's analysis in *Haggerty v. USAIR* is similar to the analysis of the same court in *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, 488 U.S. 849 (1988). In that case, the court of appeals reevaluated its decisional law applying state statutes of limitations to actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Based on this Court's reasoning in *Agency Holding Corp. v. Malley-Duff Assoc., Inc.*, 483 U.S. 143 (1987), the Third Circuit reversed its prior cases and held that a federal statute of limitations applied in § 10(b) and Rule 10b-5 cases. 843 F.2d at 1545. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), this Court agreed with the Third Circuit and other circuits and applied a federal statute of limitations to a cause of action under § 10(b) of the Securities Exchange Act of 1934. *Id.* at 2781.

of these courts engaged in the inquiry required by this Court, as did the Third Circuit. The Second Circuit in *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir.), *cert. denied*, 112 S. Ct. 441 (1991), analogizing a Section 43 claim to a tort claim and applying a three-year Massachusetts statute of limitations for tort actions, observed only that the policy of Section 43 "would not be frustrated by the application of a state rule. . . ." *Id.* at 224.[12] The Ninth Circuit in *Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir. 1991), like the Tenth Circuit here, borrowed a two-year Hawaii statute of limitations applying to any suit brought in state court seeking recovery authorized by federal statute. *Id.* at 1315-16. Although the Ninth Circuit briefly discussed the federal policies at stake in Section 43, *id.* at 1315, the court declined to borrow a six-month federal statute of limitations from the NLRA, as the Third Circuit had done in *Haggerty v. USAIR*, on the ground that Section 43 does not directly involve the relationships between unions and their members or between unions and employers. *Id.*[13]

In the wake of the Tenth Circuit's decision, the courts of appeals now appear to be of three minds on Section 43: (1) given the federal policies at stake in Section 43, the Third Circuit, along with a majority of district courts, would borrow a statute of limitations of short duration from another federal statute—the six-month limitations period from Section 10(b) of the NLRA, (2) the Second Circuit would borrow a three-year state lim-

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[12] In his certiorari petition to this Court in *McDonald v. Piedmont*, petitioner McDonald raised only the issue of damages, and not the statute of limitations issue raised here.

[13] As discussed more fully below, the Ninth Circuit's distinction is inaccurate. The Third Circuit, which strongly disagreed with the Ninth Circuit on this point, noted that the level of unionization in the airline industry is nearly 90 percent. *Haggerty v. USAIR*, 952 F.2d at 787 (citations omitted). Moreover, the Third Circuit correctly observed that § 43 was inserted in the Deregulation Act at the insistence of labor unions. *Id.*; *see infra* at 25.

itations rule for tort actions, and (3) the Ninth and Tenth Circuits would borrow a two-year state residual statute of limitations for lawsuits brought under a federal statute. This Court's intervention is necessary to resolve the conflict in the Circuits and to confirm that the Tenth Circuit's incorrect borrowing analysis, *see infra*, should not be followed.

B. The Decision Below Conflicts With Decisions Of This Court And Presents Important Issues Of Federal Law

In adopting a limitations period for Section 43 claims, the Tenth Circuit misapplied this Court's longstanding "borrowing" principles. As explained more fully below, the court of appeals assumed that claims under a federal statute can be characterized uniformly only where the federal statute encompasses multiple claims. On the basis of this faulty assumption, the court of appeals mechanically turned to state law. If the Tenth Circuit had applied this Court's standards properly, it should have concluded that (i) all claims under Section 43 can be characterized uniformly, (ii) state law significantly interferes with the federal policies at stake in Section 43, and (iii) a shorter statute of limitations borrowed from Section 10(b) of the NLRA provides a far closer fit to claims under Section 43, a federal statute that creates a right that does not exist at common law and is not complementary or supplementary to any right under state statutes.

This Court has long held that where a federal statute fails to specify a limitations period within which federal claims may be brought, resort to an analogous state-law *cause of action* remains the norm for borrowing a limitations period. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72 (1983); *Campbell v. Haverhill*, 155 U.S. 610, 616 (1895). While this Court has generally directed courts to look to the most analogous cause of

action under state law, it has also instructed that where state statutes of limitations would conflict with the substantive purpose of the federal action, courts should consider applying a single statute of limitations derived from another federal law. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 147-48 (1987), quoting *DelCostello*, 462 U.S. at 171-72.

This Court has cautioned that a state legislature rarely enacts a limitations period with federal interests in mind. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). In describing the task of the lower courts in borrowing statutes of limitation, this Court has noted that federal courts must not "mechanically appl[y] a state statute of limitations because the limitations period is absent from a federal statute." *Id.* This Court explained that it is "the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of federal policies." *Id.* (citations omitted).

Calling the determination "a delicate one," this Court has formulated a set of inquiries for ascertaining whether state or federal borrowing is more appropriate. A federal court must initially determine whether claims under a federal statute should be characterized uniformly. *Lampf*, 111 S. Ct. at 2779; *Agency Holding*, 483 U.S. at 147; *Wilson v. Garcia*, 471 U.S. at 268. This is generally a question of federal law. *Agency Holding*, 483 U.S. at 147; *Wilson v. Garcia*, 471 U.S. at 268-69. With respect to this initial inquiry, the question is not whether the same time limitation should be applied throughout the United States but, even more simply, whether all claims arising out of the federal statute " 'should be characterized in the same way or should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.' " *Agency Holding*, 483 U.S. at 147 (quoting *Wilson v. Garcia*, 471 U.S. at 268). Where all claims under a federal statute

arise out of a similar set of factual circumstances, this Court has devoted less time to the inquiry. *See DelCostello*, 462 U.S. at 165-66. It is only in cases where claims under the federal statute may arise out of diverse factual circumstances, and be analogized to multiple state causes of action, that this Court has been constrained to discuss the issue at great length. *See Agency Holding*, 483 U.S. at 149; *Wilson v. Garcia*, 471 U.S. at 273.

If a uniform characterization is appropriate, as it plainly is here as shown below, a court must next decide whether a state or a federal cause of action should be the source of the limitations period. *Lampf*, 111 S. Ct. at 2779; *Agency Holding*, 483 U.S. at 147; *Wilson v. Garcia*, 471 U.S. at 268. While the practice generally has been to borrow a state limitations period, when a federal statute " 'clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking,' " this Court has turned away from state law and adopted a single federal limitations period for all claims under the federal statute at issue. *Agency Holding*, 483 U.S. at 148, quoting *DelCostello*, 462 U.S. at 171-72. In considering whether to look for a source from elsewhere in the federal law, federal courts must consider whether state rules would frustrate or significantly interfere with federal policies. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989); *Agency Holding*, 483 U.S. at 147.

The Tenth Circuit either misapplied or failed to address each of these inquiries. First, the court of appeals, misreading this Court's decisions in *Agency Holding*, *Wilson*, and *Lampf*, concluded that claims under a federal statute should be characterized uniformly *only* if the federal cause of action " 'encompass[es], *numerous and diverse topics and subtopics*, such that a single state limitations period may not be consistently applied within

a jurisdiction.'" (13a, n.6, quoting *Lampf*, 111 S. Ct. at 2779 (citations omitted; emphasis in original).) The court of appeals reasoned that since claims under Section 43 do not involve a variety of factual scenarios, there is no need for federal courts to adopt a uniform characterization of claims under the statute. (13a.) On the basis of this erroneous reading of this Court's borrowing principles, the court of appeals bypassed other important borrowing inquiries and concluded that it "must find in each state the statute that is 'most analogous,' which may vary from state to state." (13a, n.6.)

This Court has *never* suggested that only federal causes of action involving diverse factual circumstances can meet this initial "borrowing" inquiry. When dealing with any federal statute without a statute of limitations, whether simple or complex, this Court has instructed courts to decide whether *federal interests* compel that claims under the statute "should be characterized in the same way, or whether they should be evaluated differently." *Wilson v. Garcia*, 471 U.S. at 268. Under this standard, the threshold question for federal courts is whether a simple, uniform characterization of a federal statute better promotes the federal interests in predictability, judicial economy, and best fits the federal statute's remedial purpose. *Reed v. United Transp. Union*, 488 U.S. at 325-26; *Wilson v. Garcia*, 471 U.S. at 272-73. This Court has in the past answered that question in the affirmative even when all claims under the federal statute arise out of similar factual circumstances, as do claims under Section 43. *See Reed*, 488 U.S. at 325-26 (characterizing all claims arising out of § 101(a)(2) of the Labor-Management Reporting and Disclosure Act in the same way); *DelCostello*, 462 U.S. at 165 (characterizing uniformly a hybrid breach of contract/duty of fair representation claim under § 301 of the Labor Management Relations Act).[14]

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[14] The Tenth Circuit's assumption was based on the Court's decisions in *Agency Holding* and *Wilson v. Garcia*. In *Agency Holding*,

The Third Circuit in *Haggerty v. USAIR* explained that the initial inquiry of characterization "really entails an analysis of whether claims under a statute are enough alike so that a uniform statute of limitations should be applied to all of them, at least on a state by state basis." 952 F.2d at 784. It concluded that because all Section 43 claims arise out of a similar factual matrix, there was an even stronger basis for a uniform characterization than in complex statutes such as RICO and 42 U.S.C. § 1983. *Id.* at 786. Moreover, the Third Circuit analyzed the federal interests in characterizing Section 43 claims uniformly. The court of appeals believed that the goals of Section 43, a transitional labor statute, would be obstructed if there were uncertainty and time-consuming litigation as to the collateral question of the appropriate statute of limitations. *Id.*

The Third Circuit's conclusion is compelling. A lack of uniform treatment among the many state jurisdictions in which furloughed employees may exercise their Section 43 rights would cause uncertainty for both multi-state air carriers and employees. A simple, uniform characterization of this federal statute is undoubtedly better suited to avoid forum-shopping and a waste of judicial resources. The Tenth Circuit never considered these points—deciding instead, after incorrectly stating

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the Court chose to characterize uniformly causes of action under RICO, a statute which has been construed to prohibit a variety of conduct. 483 U.S. at 149. Similarly, the Court in *Wilson v. Garcia* characterized claims under 42 U.S.C. § 1983 uniformly. 471 U.S. at 273. In neither case did the Court reserve a determination of uniformity only for federal statutes that encompass a variety of claims. In fact, in *Wilson v. Garcia*, this Court agreed with the conclusion of the lower court (which happened to be the Tenth Circuit) that § 1983 claims should be treated uniformly "*even though* § 1983 encompasses a wide variety of factual situations and legal theories . . . ." *Id.* at 265, citing *Wilson v. Garcia*, 731 F.2d 640, 651 (10th Cir. 1984) (emphasis added).

the initial inquiry, that it must go directly to state law. (12a-13a.)[15]

The Tenth Circuit also failed to address the other issues of the borrowing inquiry: whether application of state rules would significantly interfere with the federal policies at stake in Section 43, and whether a rule from elsewhere in the federal law clearly provides a closer analogy than available state statutes. *Lampf*, 111 S. Ct. at 2779; *Agency Holding*, 483 U.S. at 148; *DelCostello*, 462 U.S. at 171-72. In answering the first of these two questions, this Court has instructed the federal courts to "accord particular weight to the geographic character of the claim." *Lampf*, 111 S. Ct. at 2779. The Tenth Circuit, however, addressed none of these questions.

Section 43, like RICO, covers the national scene. Protected employees may sue air carriers in every jurisdiction to which they fly and in which they have employees. Therefore, the timeliness of a Section 43 claim may depend upon the location of the air carrier, the residence of the protected employee, and the particular state in which the protected employee submits his employment application. If federal courts were to rely on the patchwork of state law for borrowing purposes, rejected job applicants might shop for the most favorable limitations period and air carriers could be subject to a different statute of limitations from state to state.[16]

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[15] The confusion that exists to date is likely to produce further litigation in this area. As demonstrated above, there is disagreement within the circuits and within the district courts over the most analogous state law to borrow. *See supra* at 11 & n.10, 14-15. Furthermore, the state residual statute of limitations borrowed by the Tenth Circuit is presently codified in only *three* other states besides Colorado. *See infra* at 21.

[16] Until this issue is finally settled, air carriers might even be subjected to more than one statute of limitations within each state. Two federal courts, applying Colorado law in two separate lawsuits, have subjected United to two different statutes of limitations in § 43 actions, *compare Punahele v. United Air Lines, Inc.*, 743 F. Supp. 758, 759-60 (D. Colo. 1990) (six-month statute of limitations under

The Tenth Circuit's decision creates practical litigation problems as well. Our review of the statutes of limitations in the fifty states indicates that only *four* states in the United States have statutes of limitation for liability created by a *federal* statute. *See* Colo. Rev. Stat. § 13-80-102(1)(g); Haw. Rev. Stat. § 657-11 (Supp. 1991); Neb. Rev. Stat. § 25-219 (1989); Wyo. Stat. § 1-3-115 (1977). Based on the conclusion of the Tenth Circuit, air carriers would have to litigate the limitations issue in 46 states. Twenty-five states also have residual statutes of limitations for liability based upon a statute (without expressly referring to a federal statute); the statutes of limitations in those states range from one year, Ariz. Stat. Ann. § 12-541 (1992), to eight years, Wyo. Stat. § 1-3-105(a)(ii)(B) (1977), with most being three or six years. Thus, borrowing state statutes of limitations for claims under Section 43 can lead only to multiple limitations periods. This is precisely what federal policy seeks to avoid. *Cf. Robinson v. Pan Am. World Airways*, 777 F.2d 84, 87-88 (2d Cir. 1985) ("Where an industry is national rather than local and there is a particular federal interest in speedy, orderly resolution of disputes, the application of conflicting state time periods interferes with the goal of the legislation and is inappropriate.").

The problem is compounded because Section 43 of the Deregulation Act encourages dislocated employees, through relocation assistance, to look for employment in states outside of their states of residence. 49 U.S.C. app. § 1552(c) (1988). Respondents Hart and Howard stated on their United employment applications that they would be willing to relocate. Under the Tenth Circuit's holding, a claim against a single air carrier could be time barred

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Colorado law or the NLRA) *with Bowdry v. United*, 956 F.2d at 1006 (two-year statute of limitations under Colorado law), further demonstrating the appropriateness of a uniform federal statute of limitations in this case.

in one state and viable in another depending on where the job vacancy arose. Such an anomalous result could not have been intended under a regulatory system that has created a national "Center to maintain a comprehensive listing of all vacancies listed by air carriers . . . ." 29 C.F.R. § 220.40(a) (1991).

A state limitations rule, giving a protected employee a cushion of two or more years to sit on his rights, also significantly interferes with the federal interests at stake in Section 43. The first-hire right was devised as a means of making employment opportunities available to protected employees, thereby "decreas[ing] the cash payments required under the program." Senate Report at 116. The dual purpose of moving employees into jobs and ending federal financial assistance payments points to a short limitations period requiring protected employees to act quickly. In view of Congress's intent to move eligible protected employees off assistance and into jobs, only a short statute of limitations can accomplish that goal.[17]

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[17] The need for prompt action is reflected in the proposed regulations issued by the Department of Labor on March 30, 1979 to implement § 43. 44 Fed. Reg. 19146 (1979) (67a). These proposed regulations included an administrative mechanism for resolving an employee's claim concerning his first-hire rights. Under § 638.13 of the proposed regulations, an employee could file a complaint with the area administrator of the Labor-Management Services Administration regarding an alleged denial of his rights under § 43. *Id.* at 19150-51 (67a). The proposed regulations provided that the complaint "must be filed within *90 calendar days* of the alleged denial of the first right of hire." *Id.* at 19151 (emphasis added). This proposed rule was never finalized because the Department of Labor later concluded that it had no enforcement powers under § 43. *See* 47 Fed. Reg. 41304, 41306 (1982). Nevertheless, it reflects the preliminary interpretation of the federal agency responsible for § 43.

In addition, the regulations finally promulgated further illustrate the need for quick resolution of disputes arising under § 43. 29 C.F.R. § 220 *et seq.* (1991). The Department of Labor has established a 60-day period for employees to challenge a determination by their former employer that the employee is not a protected em-

Finally, the Tenth Circuit disregarded the question of whether federal law provides a more closely analogous limitations period than possible state-law alternatives. Section 43 provides a unique federal claim—implied from the statute—challenging a failure to hire certain employees who had worked in the airline industry under government regulation and who were "furloughed or otherwise terminated" during the first ten years of deregulation. 49 U.S.C. app. § 1552(d) (1988). Section 43 is not complementary or supplementary to any remedy under state law. *Cf. Wilson v. Garcia*, 471 U.S. at 273 (§ 1983 claim arguably analogous to state tort claims for false arrest, assault and battery, or personal injuries). There is no state statutory or common law right to an equivalent remedy. It truly has no precise counterpart under state law.

Distilling the essence of a cause of action under Section 43, each claim enforceable under the statute is, in reality, an arbitrary or discriminatory refusal to hire a member of a specific class of employees in violation of a federal statute. *See, e.g., Gonzalez v. Aloha Airlines*, 940 F.2d at 1314; *McDonald v. Piedmont*, 930 F.2d at 225. Section 43 claims, therefore, should be so characterized for statute of limitation borrowing purposes.[18]

As the Third Circuit and a majority of district courts have recognized, the federal courts have available to them a federal statute very similar to that at issue here. The most appropriate statute of limitations to apply to a

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ployee under the Deregulation Act. *Id.* § 220.25(c), 220.26(a) (1991). This provision further supports the conclusion that all disputes arising under § 43 must be expeditiously resolved.

[18] The Department of Labor regulations reinforce the idea that § 43 is designed to prohibit arbitrary or discriminatory treatment. The regulations permit an air carrier to apply its regular hiring qualifications to protected employees, 29 C.F.R. § 220.21 (1991), implying that an air carrier can violate § 43 if it applies its hiring qualifications to protected employees in an arbitrary or discriminatory manner.

Section '43 claim is the six-month statute of limitations for claims under Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1988). Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." *Id.* Employers who refuse to hire a job applicant because of his union or non-union activities or membership, rather than for a legitimate business reason, violate Section 8(a)(3) of the NLRA. *See, e.g., Savoy Faucet Co.*, 241 NLRB 51 (1979), *enforced without op., NLRB v. Savoy Faucet Co.*, 628 F.2d 1345 (2d Cir.), *cert. denied*, 449 U.S. 872 (1980).

Section 43 of the Deregulation Act and Section 8(a)(3) of the NLRA are each federal labor statutes designed to protect a specific group of employees from a hiring decision based on non-legitimate reasons—in the case of Section 43, protected employee status, and in the case of the NLRA, union or non-union status. Both laws create purely statutory rights that do not exist in common law. Furthermore, both statutes are designed to promote stability in the labor market. Moreover, as the Third Circuit recognized, an employee "asserting the right to first hire under [Section 43] is in an analogous position to a permanently replaced economic striker who has six months to file charges of unfair labor practice [under the NLRA] if s/he has not been reinstated after the replacement quits or is terminated." *Haggerty*, 952 F.2d at 787. Respondents' claim thus resembles an unfair labor practice for discriminatory hiring, 29 U.S.C. § 158(a)(3) (1988), which has a six-month limitations period under Section 10(b) of the NLRA, *id.* § 160(b).[19]

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[19] In *Agency Holding*, this Court concluded that RICO and the Clayton Act were analogous for statute of limitations purposes, even though one statute seeks to eradicate the operation of an enterprise through a pattern of racketeering activity and the other seeks to eliminate anti-competitive conduct. 483 U.S. 150-51. Although the NLRA and the Deregulation Act serve different pur-

The Ninth Circuit was incorrect in dismissing the application of Section 10(b) of the NLRA solely because it believed Section 43 does not implicate collective bargaining or union-management relations. *See Gonzalez v. Aloha Airlines*, 940 F.2d at 1315. Section 43 is not at all divorced from union-management relations or collective bargaining. As this Court and the Third Circuit have noted, it was at the urging of union leaders that Congress included Section 43 in the Deregulation Act to provide protection similar to the protection afforded employees in the heavily unionized railroad industry. *Alaska Airlines*, 480 U.S. at 692 n.16; *Haggerty*, 952 F.2d at 787.[20] Moreover, Section 43 is a federal codification of labor protective provisions that today are subjects of the collective bargaining process for the entire airline industry. Before deregulation, the CAB had conditioned its approval of mergers and acquisitions in the airline industry on the surviving carrier's acceptance of labor protective provisions, such as compensation for layoffs and lost seniority rights. *E.g., Air Line Pilots Assoc. Int'l v. Department of Transp.*, 791 F.2d 172 (D.C. Cir. 1986). Following passage of the Deregulation Act, the CAB announced that it would henceforth not impose labor protective provisions absent exceptional circumstances and advised labor unions to seek such protections through the collective bargaining process. *See National Airlines Acquisition*, 84 C.A.B. 408, 475 (1979) ("LPPs will no longer be imposed as a matter of course,

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poses, § 8(a)(3) and § 43 are analogous because they accord employees special protection in the context of the employer-employee relationship.

[20] Indeed, Respondents, who are all Union members, seek relief in this case that would require United to hire them and award them retroactive seniority as far back to 1988. Such relief, if granted, would adversely affect other unionized United employees in terms of adjustments in seniority. Since these United employees are innocent bystanders, fairness dictates that any action under § 43 commence quickly.

or because tradition dictates their use. We therefore advise labor to negotiate its own merger protections through the collective bargaining process at the first opportunity."). Therefore, Section 43 directly implicates a matter that is the subject of collective bargaining in the airline industry.[21]

This Court should grant review to resolve the confusion in the Circuits and to assure that its borrowing rules are applied correctly by the federal courts. As demonstrated above, and by the Third Circuit and the majority of district courts, application of state-law rules conflicts with the federal interests at stake in Section 43. The conflict and confusion concerning this important federal statute in the airline industry provide compelling reasons for granting certiorari.

II. THE TEST FOR BORROWING A STATE LIMITATIONS RULE ADOPTED BY THE COURT OF APPEALS IS CONTRARY TO SUPREME COURT PRECEDENT

The Tenth Circuit's state-borrowing analysis is in direct conflict with this Court's longstanding decisions. For close to a century, this Court has held that when Congress has failed to provide a statute of limitations for a federal cause of action, federal courts are to borrow the limitations period from a state *cause of action* similar in nature to the case at hand. *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) ("Congress . . . intended

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[21] Conceding in the courts below that there "is clearly no 'most analogous' state statute" of limitations, Respondents argued that if any federal statute should apply to § 43, it is the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1988) ("ADEA"). But under the ADEA, like other federal employment statutes, an employee must act quickly to preserve a claim. An employee must file a charge of employment discrimination within 180 days (or 300 days in a deferral state) after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(1) (1988).

to subject such action to the general laws of the State applicable to *actions of a similar nature*") (emphasis added); *see also Wilson v. Garcia*, 471 U.S. at 266-67. In borrowing state law, this Court has examined the essential nature of the federal claim to determine the most analogous state cause of action and limitations rule. *See Reed v. United Transp. Union*, 488 U.S. at 334; *Goodman v. Lukens Steel*, 482 U.S. 656, 661-62 (1987).

The court of appeals below neither examined the essential nature of a Section 43 claim nor explained why a Colorado residual statute is somehow the most analogous state limitation period. Indeed, no meaningful analogy can be drawn between a Section 43 claim and a Colorado rule relating to *every* lawsuit based upon a federal statute lacking a limitations period. Colo. Rev. Stat. § 13-80-102(1)(g).[22] The only analogy, marginal as it is, is that Section 43 is a "federal statute" without a limitations period. That characterization is merely a description of Section 43's source—not, as this Court requires, a characterization of the essential nature of a Section 43 claim. *Cf. Reed v. United Transp. Union*, 488 U.S. at 326 (because LMRDA § 101(a)(2) "protects rights of free speech and assembly, and was patterned after the First Amendment, it is readily analogized for the purpose of borrowing a statute of limitations to state personal injury actions."); *Wilson v. Garcia*, 471 U.S. at 276 (choice of

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[22] The Ninth Circiut also borrowed a state limitations period for actions to enforce a right created by a federal statute. *Gonzalez v. Aloha Airlines*, 940 F.2d at 1316. The Ninth Circuit's adoption of that state limitation period under Hawaii law does not support the Tenth Circuit's decision to reach a like conclusion under Colorado law. In *Gonzalez*, the only state statutes of limitations presented to the court by the parties concerned claims created by federal law and a state catch-all limitations period. *Id.* at 1315. Given the choice of the two state statutes, it is not surprising that the court in *Gonzalez* chose the limitations period for claims created by federal law. The possible analogous state statutes of limitations available under Colorado law are not so limited.

uniform state statute of limitations for recovery of damages for personal injuries "is supported by the nature of the § 1983 remedy. . . .").

Federal courts must adopt a state statute of limitation that best serves federal policy. A state legislature's selection of differing limitations periods for different causes of action is "grounded in its evaluation of the characteristics of those claims relevant to the realistic life expectancy of the evidence and the adversary's reasonable expectations of repose." *Wilson v. Garcia*, 471 U.S. at 282 (O'Connor, J., dissenting). When the state legislature has presumably considered the essential elements of the same or an analogous state cause of action, the state statute is then close enough to fill the void in federal law. *Wilson v. Garcia*, 471 U.S. at 271 ("[b]y adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the *substantive policies* of enforcement embodied in the state *cause of action*") (emphasis added).

The Tenth Circuit failed adequately to consider the substantial federal policies at stake in Section 43 when it borrowed Colorado's two-year residual rule. Explaining its decision to borrow this rule, the Tenth Circuit reasoned that "Colorado has specifically weighed the interests of its citizens who may assert federal rights." (15a.) However, in enacting Colorado's two-year residual statute for all actions created by a federal statute, Colo. Rev. Stat. § 13-80-102(1)(g), the Colorado legislature did not weigh the interests of its citizens pertaining to a Section 43 claim.[23] In adopting this legislative determination, the Tenth Circuit failed to assess the underly-

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[23] In fact, given the multi-state nature of a § 43 claim, *see supra* at 20, many § 43 plaintiffs will not be citizens of the state in which the action is brought.

ing policies relevant to determining the appropriate statute of limitations as required by this Court.[24]

The district court, unlike the Tenth Circuit, did engage in this analysis. Had the Tenth Circuit properly applied this Court's state-law borrowing principles, it would have adopted the statute of limitations in either the Colorado Labor Peace Act, Colo. Rev. Stat. § 8-3-110(16) (six-month limitation), or the Colorado Employment Practice Provisions, Colo. Rev. Stat. § 24-34-403 (six-month limitation). These Colorado state statutes involve causes of action that are clearly more analogous to a Section 43 claim than the claims embodied in the Colorado residual limitations rule. Like Section 43, the Colorado Employment Practice Provisions circumscribe "an employer's discretion in hiring decisions based on certain applicant characteristics." *Punahele*, 743 F. Supp. at 760. Under the Colorado Employment Practice Provisions, an employer can refuse to hire someone for legitimate business reasons, e.g., an applicant who does not meet the employer's hiring qualifications. Colo. Rev. Stat. § 24-34-402(1)(a). Similarly, Section 43 prohibits an employer from refusing to hire a protected employee unless the job applicant does not meet the employer's qualifications and requirements for the job. 29 C.F.R. § 220.21 (1991). Moreover, Section 43, like the Colorado Employment Practice Provisions, specifically proscribes hiring decisions on the basis of age. 49 U.S.C. app. § 1552(d) (1988); Colo. Rev. Stat. § 24-34-402(1)(a). The Colorado Labor Peace Act, Colo. Rev. Stat. § 8-3-110 (1), like Section 8(a)(3) of the NLRA, 29 U.S.C. § 158 (a)(3) (1988), prohibits an employer from discriminating against a job applicant because of his membership or

[24] In *Punahele v. United Air Lines*, the district court in Colorado explicitly rejected the use of Colo. Rev. Stat. § 13-80-102(1)(g) for actions under § 43 of the Deregulation Act. While the court acknowledged that § 43 is a federal statute, it observed that it "still must locate and apply the statutory period found in the state statute *most analogous* to the [Deregulation Act]." 743 F. Supp. at 760 (emphasis in original).

non-membership in a union. It, too, is a far closer fit than the Colorado residual limitations period adopted by the Tenth Circuit.

This Court should review the decision of the court of appeals because its decision not only creates confusion in the circuits, but its analysis disregards the fundamental state-law borrowing principles to which this Court has long adhered.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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Dated: June 25, 1992

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-1054

CHARLES BOWDRY, BOB BERGER, RALPH ESTILL, JAMES HARTZER, RICH KENNON, LOREN MACH, GLENN MULLINS, NORMAN RANKIN,AND RUSSELL ESTILL,
Plaintiffs,

and

PAUL HART, MILTON HOWARD, and DANE VANNICE,
Plaintiffs-Appellants,

v.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Feb. 13, 1992

John Mosby (Elisa Moran, with him on the briefs), Denver, Colo., for plaintiffs-appellants.

Kris J. Kostolansky (Michael D. Nosler and Frank Lopez, with her [sic] on the brief) of Rothgerber, Appel, Powers & Johnson, Denver, Colo., for defendant-appellee.

Before SEYMOUR, and ANDERSON, Circuit Judges, and Aldon J. ANDERSON, District Judge.*

STEPHEN H. ANDERSON, Circuit Judge.

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* Honorable Aldon J. Anderson, Senior Judge, United States District Court for the District of Utah, sitting by designation.

Appellants Paul Hart, Dane Vannice and Milton Howard appeal from a district court order granting summary judgment to United Air Lines, Inc. ("United") and dismissing their complaint against United for allegedly violating its duty to accord them their first right of hire under section 43(d) of the Airline Deregulation Act of 1978 (the "Act"), 49 U.S.C.App. § 1552(d).

Before us are two issues: first, whether appellants relinquished their first right of hire under section 43(d) of the Act by rejecting an offer for employment in their occupational specialty; and second, whether the district court properly held that the statute of limitations for actions brought under section 43(d) of the Act is six months. Because we find the district court improperly ruled on both issues, we reverse.

I

The appellants were employed with Frontier Airlines, Inc. ("Frontier") until Frontier ceased operations and filed for bankruptcy in August of 1986. During the Frontier bankruptcy proceedings, a motion was filed seeking approval of a Job Preservation Agreement (the "JPA") between Frontier, its parent, Continental Airlines, Inc. ("Continental"), and various Frontier unions representing appellants and other Frontier union employees. *See* Appellee's Appendix, Ex. C. The JPA was designed to eliminate the majority of claims against the Frontier estate in order to advance Continental's purchase and utilization of Frontier's assets. Under this agreement the participating employees would waive certain claims against Frontier and Continental, and in return receive either the opportunity to be employed with Continental, as vacancies became available, or a payment in cash and/or Continental flight passes. *Id.* Each appellant, foregoing the option to accept the employment opportunity, chose a payment of cash and/or passes. United presented evidence that had appellants chosen the employ-

ment option, they would have received employment in their occupational specialty from Continental. Appellants challenged the inference drawn from that evidence.

Subsequently, on different occasions, each appellant sought unsuccessfully to obtain employment with United. Appellants with other plaintiffs then brought an action against United, alleging that United failed to accord them their first right of hire to which they were entitled under section 43(d) of the Act. Upon United's motion for summary judgment, the district court dismissed the complaint as to the appellants, holding that they had lost their first right of hire prior to the time United refused to offer them employment. The district court also held in conjunction with a summary judgment motion against appellant Vannice, that a six month statute of limitations applied to this claim, although it denied summary judgment, because there were still questions of material fact as to when the limitations period commenced.

II.

In reviewing the district court's order, we must first decide whether the court properly ruled that the appellants were not protected employees that had been "furloughed or otherwise terminated" within the meaning of section 43(d) of the Act, and therefore not entitled to a first right of hire by United. In connection with this, we must consider United's argument that under section 43(d), taken as a whole, an employee that rejects an offer of employment in his or her occupational specialty by a covered airline relinquishes the first right of hire.

In reviewing a summary judgment order, we apply the same standard applied by the district court under Fed.R. Civ.P. 56(c). *E.g., Osgood v. State Farm. Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir.1988). The inquiry is whether there are any genuine issues of material fact, and whether the moving party was entitled to judgment as a

matter of law. *Id.* "[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." *Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

In enacting the Airline Deregulation Act, Congress included an Employee Protection Program (the "EPP") to protect airline employees from the potentially harsh consequences of deregulation. This program consists of two parts: a monthly assistance program for eligible employees that have been dislocated, and a duty by covered airlines to hire protected employees before hiring other, non-protected applicants. It is the latter that concerns us here. In relevant part, section 43(d) of the Act provides:

> Each person who is a *protected employee* of an air carrier which is subject to regulation by the Civil Aeronautics Board *who is furloughed or otherwise terminated by such an air carrier (other than for cause)* prior to the last day of the 10-year period beginning on October 24, 1978 *shall have first right of hire*, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person.

49 U.S.C.App. § 1552(d)(1) (emphasis added).

Subsection (h)(1) defines a "protected employee" as "a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title." 49 U.S.C.App. § 1552(h)(1). There is no dispute that all appellants fall within that definition. Nor is there a dispute that both Frontier and United are air carriers holding a section 1371 certificate.

The initial dispute lies over the proper construction of the phrase "furloughed or otherwise terminated by such an air carrier (other than for cause)."

The rules and regulations promulgated by the Secretary of Labor under authority of section 43(f) of the Act, 49 U.S.C.App. § 1552(f), are relevant to this question. Tracking the language of the statute, these regulations provide that a person entitled to a first right of hire (a "designated employee") is a "protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period." 29 C.F.R. § 220.10(a). However, "a protected employee shall not be deemed to be furloughed or terminated" if such employee "resigned or voluntarily quit for any reason." 29 C.F.R. § 220.10(b)(6).

The district court relied on this language to dismiss the appellants' complaint. It equated the acceptance of severance benefits and the voluntary decision to "discontinue" working, albeit with another airline, with resigning or quitting. However, we cannot agree with that characterization. To have lost their entitlement, logically, the appellants would have needed to resign or quit from either Frontier or Continental. The appellants are quick to point out, with the record's support, that in fact, they never resigned or voluntarily quit the employ of Frontier and that they never resigned or voluntarily quit the employ of Continental.

It is beyond dispute, that the appellants were terminated by Frontier when it ceased its operations and declared bankruptcy. Opinion Letter, U.S. Department of Labor, Case No. 244B at 2 (March 29, 1988) ("Opinion Letter"), Appendix of Appellants, Tab 13, Ex. 2 ("There is no question that all the protected employees of the Frontier became eligible for designated status upon the cessation of airline operations by the carrier on August 24, 1986."). Likewise, it is beyond dispute that the appellants never worked for Continental and therefore

could not possibly have resigned voluntarily from its employ. Further, the continuity between employment at Frontier and the potential employment at Continental was not such that the decision to refuse employment with Continental is tantamount to quitting the Frontier job. *Cf. Id.* (the JPA's provision for "employment at completely different airline" could not be viewed as a recall).

Recognizing this, United offers a variation on the district court's reasoning. While it does not (and cannot) base its argument squarely on any language of the statute or the regulations, it argues from the policy of the statute and by analogy of the regulations. The operative fact from United's perspective is that each employee rejected a ready-made offer by Continental for employment in his occupational specialty. (Although, in fact, the appellants rejected an offer to receive the right to an offer of employment, as jobs became available.) By doing so, argues United, the appellants relinquished their designated status. According to United, since the purpose of the Act was to provide designated employees with employment in their occupational specialty, should they involuntarily lose their jobs, an employee that has but rejects an offer in his or her occupational specialty is in the same position as others who lose their first right of hire, such as (1) a protected employee who has a job with a covered airline but quits or resigns, *see* 29 C.F.R. § 220.10(b)(6); (2) a designated employee who after having lost a job actually obtains a new one, *see* Opinion Letter at 3-3; or (3) a designated employee who is recalled by his former carrier, *see* 29 C.F.R. § 220.10 (c). In this same regard, United relies on the position taken in *Crocker v. Piedmont Aviation, Inc.*, 741 F.Supp. 241 (D.D.C.1989) (employee that received new employment with noncovered airline extinguishes first right of hire), which was reversed by the D.C. Circuit, *see Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir.1991), and rejected by the Ninth Circuit in *Gonzalez v. Aloha Airlines*, 940 F.2d 1312, 1317 (9th Cir.1991).

It is the practice of this Court to interpret statutory language according to its plain meaning. Under the interpretation United offers, a designated employee applying for renewed employment with various airlines (offering different salaries and benefits), immediately upon rejecting the first and perhaps least desirable offer by one airline, loses his or her first right of hire as to any other airline. In United's view, designated employees have no right to "pick and choose" between available employment opportunities. We find nothing in the language of the statute or the regulations to sanction that result, and certainly, such a provision could easily have been written had Congress intended.

On the other hand, the three types of situations United cites can reasonably be grounded on the language of the statute. An employee that resigns or quits has not been involuntarily "furloughed" or "terminated" in the plain sense of those terms. Likewise, when the furloughed employee has been recalled by his former employer, the condition giving rise to the first right of hire—the furlough—has by definition ceased. Finally, even the proposition that a person loses the first right of hire upon obtaining employment (at least with a covered air carrier) finds reasonable support in the language; the whole object of the first right of hire has been realized—the employee has been "hired." There is no similar language on which to base the rule that a designated employee who rejects an offer of employment in his or her occupational specialty loses the first right of hire. *Cf. Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312, 1317 (9th Cir.1991) (in rejecting the stronger claim that actual employment by non-covered airline terminates first right of hire, court notes that the Act "says nothing of the effect of [plaintiff's] employment with a non-covered airline on his EPP rights").

Further, this construction is bolstered by the related government assistance provisions of section 43. These

provisions provide for monthly assistance to eligible, dislocated airline workers until they obtain other employment, or until the end of 72 months after the date of first payment, 49 U.S.C.App. § 1552(e). The duty to hire provision was adopted in conjunction with the monthly assistance program in part to reduce the burden on the federal government purse. *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220, 227 (2d Cir.1991); *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024, 1027 (D.D.C. Cir.1991) (citing legislative history).[1] While these monthly payments may be reduced if a recipient rejects an offer for "reasonably comparable employment," 49 U.S.C.App. § 1552(b)(2), they are not terminated. Therefore, were we to extinguish the first right of hire upon a recipient's rejection of a job, under the statute the government would be required to continue making payments, and the first right of hire would not serve to shorten the duration of the government's obligations—a result that unreasonably defeats the purpose of the duty to hire.

Finally, we cannot say that the appellants' choice to take money in connection with the JPA instead of waiting for employment puts them in the same position as those fellow employees who lost their first right of hire upon commencing employ with Continental, assuming this is a correct description of their legal status, *see* Opinion Letter at 2-3. Under the JPA, the appellants could accept money and take their chances in finding new employment (with a first right of hire that by no means guarantees future employment), or they could accept the employment option and receive the right to an eventual offer of employment with a cut in salary and benefits. *Id.* at 2. Neither choice, though, should be viewed in

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[1] In fact, the federal government reduced the burden on its purse by simply refusing to appropriate funds to the public assistance program. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 681, 107 S.Ct. 1476, 1478, 94 L.Ed.2d 661 (1987).

the first instance as an opportunity to vindicate entitlements bestowed by the Act.[2] The choice between cash or a future offer of employment was simply a benefit that Continental offered to settle the employees claims against the bankrupt estate, paving the way for its purchase and rapid utilization of Frontier's assets. *See Id.* at 1. The appellants accepted immediate cash, giving up any rights they might have had of independently pursuing these claims against the estate. Certainly, under the Act there is nothing to suggest that had Frontier simply terminated these three employees (other than for cause) and paid them severance benefits or other amounts owed to them for some other reason, they would not be protected em-

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[2] We do not find the language in the Opinion Letter controlling as to employees that accepted cash in lieu of employment. The letter simply does not address that issue. The reference to employees who "did sign the waiver and received the benefits of the Agreement," as the next sentence explicitly states, refers to those employees who "accepted a new job with a covered carrier." Opinion Letter at 2. Those employees that accepted the employment option but had not yet received an actual offer to commence employment were still designated employees until they actually began working for Continental. *Id.* Therefore, even acceptance of the employment option under the JPA did not automatically terminate an employee's first right of hire.

In this regard, we note that even if our analysis were to turn on whether or not appellants rejected an offer for reasonably comparable employment by a covered airline, the entitlement bestowed by the JPA's employment option was not an offer of employment in the usual sense. Under the terms of the JPA, those choosing the employment option would "be placed in seniority upon a guaranteed job offer list which Continental will use to fill future job opportunities as they become available." JPA, Appellee's Appendix at 323. Further, under the JPA a "Frontier employee may be obligated to accept employment in a city (metropolitan area) other than the city of his/her last employment at Frontier." *Id.* at 324-325. Whether the appellants would in fact have received an actual offer had they chosen the employment option, or whether in fact they would have remained in Denver are irrelevant. It was clear that the status of each appellant, as viewed *ex ante* under the JPA, was merely that of a "Frontier employee potentially eligible for a job offer from Continental." *Id.* at 326-27.

ployees with first rights of hire by another covered airline. Therefore, for purposes of the act, we cannot equate the money appellants received in satisfaction of claims they had against Frontier with new employment by a covered air carrier, and we cannot hold as a matter of law that appellants lost their first right of hire under section 43(d).[3]

III.

Next, we must decide whether the district court correctly found that a six month statute of limitations applies to the private right of action under the Act. Three circuits and a host of district courts have considered this issue, with differing results. *See Haggerty v. USAir, Inc.*, 952 F.2d 781 (3d Cir.1992) (applying the six-month federal statute of limitations found in the NLRB); *Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir.1991) (applying state one-year statute of limitations for actions vindicating federal rights); *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir.1991) (applying state three-year statute of limitations for tort actions); *see also, e.g., Crocker v. Piedmont Aviation, Inc.*, 696 F.Supp. 685, 690-92 (D.D.C.1988) (applying the District of Columbia three-year catch-all statute of limitation for backpay); *Punahele v. United Air Lines, Inc.*, 743 F.Supp. 758 (D.Colo.1990) (position taken by district court: six-month statute of limitations applies whether court adopts Colorado state law or statute of limitations found in the NLRB).

The question of the applicable statute of limitations is not an insignificant matter.[4] Surely, whether a pro-

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[3] Despite the appellants' apparent willingness to make an issue of it, United has not attempted to argue that the waiver itself which appellants signed in connection with the JPA acted directly to waive their statutory rights under the Act as to United.

[4] Of course inherent in the statute is a sunset provision that will eventually make the question moot. Protected employees terminated after October 23, 1988, no longer obtain a first right of hire. 49 U.S.C.App. § 1552(d)(1).

tected employee's claim is extinguished in six months or six years has a great practical effect on the nature of the entitlement and hence on the political objectives Congress sought to obtain. But Congress remains silent on the issue.[5]

Limitations on a federal claim of right are grounded in federal law. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 159 n. 13, 103 S.Ct. 2281, 2288 n. 13, 76 L.Ed.2d 476 (1983). Taking the law as we find it, we note that when Congress does not specify a statute of limitations, the settled practice is to presume that Congress intended the courts to apply the most analogous state law statute of limitations. *Id.*; *see also Wilson v. Garcia*, 471 U.S. 261, 266, 105 S.Ct. 1938, 1942, 85 L.Ed. 2d 254 (1985). This is a fiction, a default rule; it seems rather unlikely that in fact Congress intended that in Hawaii a valid claim is extinguished after one year, while Massachusetts employees get the benefit of a three-year statute. However, the presumption does give weight to certain state interests. Statutes of limitations promote policies of repose, providing for a period after which "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* at 271, 105 S.Ct. at 1944. "By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.*

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[5] The EPP in its current form leaves much of the legislative task undone. Section 43(d) pretends only to create a protected employee's "first right of hire" and the airlines' corresponding "duty to hire such a person before they hire any other person." 49 U.S.C. App. § 1552(d)(1). The courts have been left to write the rest of the statute, deciding whether Congress "intended" to create a private right of action, the nature of the appropriate remedy, the extent of damages (if that is the appropriate remedy), and the applicable statute of limitations.

This presumption is not unbending, however. "[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *DelCostello*, 462 U.S. at 171-72, 103 S.Ct. at 2294.

Nevertheless, if we are "to take seriously [the Supreme Court's] admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies," *Reed v. United Transportation Union*, 488 U.S. 319, 327, 109 S.Ct. 621, 627, 102 L.Ed.2d 665 (1989), we must apply a Colorado state statute of limitations in this case. In reaching this decision, we join the Second and Ninth Circuits. *See McDonald v. Piedmont Aviation, Inc.*, 930 F.2d at 225 ("no reason to vary from the longstanding practice of adopting a state statute of limitations in the face of Congressional silence"); *Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d at 1315 (9th Cir.1991) ("Application of a state statute of limitations therefore would not, as in *DelCostello*, undermine federal policies."). And we must reject the position recently taken by the Third Circuit in *Haggerty v. USAir, Inc.*, 952 F.2d 781 (3d Cir.1992).

The Third Circuit's decision to apply a federal instead of a state statute of limitations was based on the fact that an employee can attempt to exercise his right of first hire with several employers in several different states and that airlines could therefore be subject to a different limitations period in each of the states in which they operate. Citing *Agency Holding Corp.*, the court determined that "if the carriers were subject to varying state limitations periods they could not '"calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."'" *Haggerty*, at 786. "Moreover," concluded the court, "it is not easy to find a state limitations period that is an appropriate analogy." *Id.* at 786.

We believe this analysis is mistaken. If this rationale were adopted there would hardly be occasion to adopt the state statute of limitations. Every time a state rule is adopted instead of a federal rule, an entity operating in various states will likely be subject to varying state statutes of limitations. Further, the single claim that may arise under the EPP is very dissimilar from the unlimited variety of claims arising under RICO, which the Court confronted in *Agency Holding Corp.*, 483 U.S. at 149-50, 107 S.Ct. at 2764. Once the issue has been settled in a state as to which limitation applies, the matter is settled as to any future case arising under the EPP. To the contrary, under RICO, with its concepts of "enterprise" and "pattern of racketeering activity" and the various types of predicate offenses, which might have occurred in different states, any given case may create confusion over the proper limitations period. *See* 483 U.S. at 149-50, 107 S.Ct. at 2764.[6]

Further, the court's inability to find an "appropriate analogy" does not change our obligation to adopt a state statute. In *DelCostello*, the Court stated:

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[6] The court also found that all EPP claims should be treated uniformly "because in fact they are uniform." *Haggerty*, at 786. That decision misunderstands the nature of the inquiry. "Where a federal cause of action tends in practice to 'encompass *numerous and diverse topics and subtopics*,' such that a single state limitations period may not be consistently applied within a jurisdiction, we have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes. This conclusion ultimately may result in the selection of a single federal provision, or of a single variety of state actions." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, —— U.S. ——, 111 S.Ct. 2773, 2779, 115 L.Ed.2d 321 (1991) (emphasis added) (citations omitted). Unlike a RICO claim or a 1983 claim, only one type of claim will arise under the EPP. In a given jurisdiction, a single type of statute of limitations can be consistently applied. Consequently, in this case, as in the ordinary case, the federal court must find in each state the statute that is "most analogous," which may vary from state to state.

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.

462 U.S. at 171, 103 S.Ct. at 2294 (citation omitted).

The question then is which Colorado statute to apply. We hold that the proper statute to apply is Colo.Rev. Stat. § 13-80-102(1)(g), which applies a two-year limitation to "All actions upon liability created by a federal statute where no period of limitation is provided in said statute." *See Gonzalez*, 940 F.2d at 1316 ("Section . . . therefore provides the most closely analogous state statute of limitations since it expressly applies to claims created by federal law.").

Arguing against this result, United asserts the same argument that has been applied to residual state "catch-all" provisions, namely that it is "unlikely that Congress would not have intended such a statute of limitations to apply." *Agency Holding Corp.*, 483 U.S. at 153, 107 S.Ct. at 2765. This is a fiction upon a fiction. Not only is the Colorado statute not a residual "catch-all," but there is no reason to think that Congress would be less enthusiastic about the application of this statute than it would be over a different, yet analogous three-year statute applied in Massachusetts or a different, yet analogous one-year statute applied in some other state.[7] Nor is the

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[7] *Cf. DelCostello*, 462 U.S. at 169 n. 21, 103 S.Ct. at 2293 n. 21 (In response to Justice Steven's remark that there was no evidence that Congress intended analogous federal statute to be used in present context, Court responds: "With all respect, we think that

EPP so unique that another analogous statute cannot be found in states without a similar provision. *See id.* (*sui generis* nature of RICO makes it inappropriate to apply catch-all, because in states without catch-all there would be no analogous state statute).

To the extent adoption of the most analogous state statute of limitations is designed to respect the state's decision as to when citizens may repose—as long as that decision does not frustrate federal policy—then clearly this is the statute that best serves that purpose. Unlike the ordinary case where neither Congress nor the state legislature, whose statute is adopted, in fact intended that the chosen statute be used, *see* note 7, *supra*, here at least Colorado has specifically weighed the interests of its citizens who may assert federal rights with the interests that its citizens have in obtaining repose. Given the length of the period, there is no reason to believe that Colorado intended to frustrate or discriminate against a citizen's vindication of federal rights. Therefore, in Congress' silence, we will defer to that judgment.

Further, to the extent the obligation of applying state law does not spring from the statute as a matter of federal law but instead recognizes the operation of state law *ex proprio vigore*, *see Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 157-65, 107 S.Ct. 2759, 2767-72, 97 L.Ed.2d 121 (1987) (Scalia, J., concurring) (state statutes of limitation apply of their own force, unless pre-empted by federal law), or finds its inspiration in the Rules of Decision Act, 28 U.S.C. § 1652,

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this observation, while undoubtedly correct, is beside the point. The same could be said with equal or greater accuracy about the intent of the New York and Maryland Legislatures when they enacted their respective arbitration or malpractice statutes of limitations. In either situation we are applying a statute of limitations to a different cause of action, not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law." (citation omitted).

see DelCostello, 462 U.S. at 172-74, 103 S.Ct. at 2295 (Stevens, J., dissenting) (Rules of Decision Act requires application of state statute of limitations); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, —— U.S. ——, 111 S.Ct. 2773, 2778, 115 L.Ed.2d 321 (1991) (practice of applying state statutes of limitations "derived from the Rules of Decision Act"), then again this statute would be the proper choice.

Accordingly, for the reasons stated above, and the judgment of the district court is REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-S-1997

CHARLES BOWDRY, *et al.*,
Plaintiffs,

vs.

UNITED AIR LINES, INC.,
Defendant.

MEMORANDUM AND ORDER

[Filed Jan. 18, 1991]

THIS MATTER came before the Court for hearing on numerous motions on December 21, 1990. The Court notes that the claims of Plaintiffs Crist Ellis and Norma Wong-Larkin were dismissed from the above-captioned case and consolidated into Case No. 90-S-1085 by order of this Court in Case No. 90-S-1085, dated January 7, 1991. Therefore, Ellis and Wong-Larkin are no longer Plaintiffs in this case and the following motions were considered without reference to them. After reviewing the motions, briefs, supplements, exhibits, affidavits, deposition excerpts, oral argument of counsel, the applicable law, and being fully advised in the premises, the Court makes the following Findings, Conclusion, and Order.

I. *Defendant's Motion for Partial Summary Judgment Against Plaintiffs (Withdrawn as Against Bowdry), Filed June 7, 1990.*

Citing *Crocker v. Piedmont Aviation, Inc.*, 741 F.Supp. 241 (D.D.C. 1989) and Department of Labor Opinion Letter No. 244B, Defendant argues: (1) that the four plaintiffs who signed the waiver required by the JPA and went to work for Continental lost their first right of hire on the respective dates that they were hired by Continental and (2) that the Plaintiffs who settled for cash and passes instead of signing the waiver required by the JPA lost their first right of hire on October 1, 1986. Therefore, United argues, it cannot be liable for violating these Plaintiffs' first-hire rights under the Airline Deregulation Act Employee Protection Program, 49 U.S.C. § 1552(d)(1).

Plaintiffs respond that the Department of Labor Opinion Letter cannot be considered precedent and that there are issues of fact concerning whether the jobs at Continental were in the occupational specialties of the four Plaintiffs hired by Continental, whether there were available jobs at Continental in the occupational specialties of the other five Plaintiffs, and whether United hired any non-designated employees during the time that Plaintiffs' job applications to United were active. Plaintiffs and Defendant argue extensively in their supplemental filings about whether the Plaintiffs would have been hired by Continental in their occupational specialties.

It is undisputed that Plaintiffs were all protected employees. 49 U.S.C. § 1552(d)(1) provides in pertinent part:

> (d) Duty to hire protected employees. (1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or is otherwise terminated by such an air carrier (other than for

> cause) prior to the last day of the 10-year period beginning on the date of the enactment of this section [enacted Oct. 24, 1978] shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under Section 401 of the Federal Aviation Act of 1958 [49 U.S.C.S. § 1371] prior to such date of enactment. Each such air carrier hiring additional employees shall have the duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. . . .

As to Plaintiffs Burger, Mach, Mullins, and Rankin, this Court agrees with the reasoning in *Crocker*, 741 F. Supp. at 243-45. If a designated employee is hired by a covered airline, then that employee no longer has first-hire rights with other covered carriers. The Court also agrees with the reasoning in the Department of Labor Opinion Letter 244B, although the Court does not accept it as precedent, that employees who signed the waiver and received the benefits of the JPA are no longer designated employees. Because these four Plaintiffs signed the waiver and were hired by Continental, they no longer had first-hire rights that United was required to honor. The goal of the employee protection program was to ensure that the costs of deregulation did not fall too heavily, in the form of furloughs and termination, on protected employees. It does not follow that such employees be given first-hire protection forever. The signing of the waiver and resultant employment with Continental pursuant to the terms of the JPA ended these four Plaintiffs' designated status under the ADA's Employee Protection Program.

29 C.F.R. Part 220, the Airline Employees Protection Program, provides in pertinent part:

Section 220.01 Definitions

(f) "Designated Employee" means a protected employee who meets the eligibility requirement set forth in Section 220.10.

Section 220.10 Eligibility Requirements.

(a) To qualify as a designated employee eligible for rights under this part 220, the applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(6) resigned or voluntarily quit for any reason.

As to Plaintiffs Hart, Hartzer, Kennon, and Vannice, the Court finds that they were not designated employees entitled to protection under the ADA's Employee Protection Program. These five Plaintiffs signed the Election of Severance Benefits and Waiver of Claims and submitted the waivers to Continental. The definition of a waiver is "the Intentional or voluntary relinquishment of a known right". Black's Law Dictionary, 1417 (5th Ed. 1979). By signing the Election of Severance Benefits and Waiver of Claims, these Plaintiffs "resigned or voluntarily quit" pursuant to 29 C.F.R. § 220.10(b)(6), shall not be deemed to be furloughed or termination, and do not qualify as designated employees entitled to protection by the ADA.

As a matter of law, Plaintiffs Burger, Mach, Mullins, and Rankin lost their first-hire rights on the dates they were hired by Continental. Any hiring done by United after those dates could not have violated these four Plaintiffs' rights under the ADA. United cannot be liable to Burger after November 13, 1986, to Mach after November

2, 1986, to Mullins after October 31, 1986, or to Rankin after November 2, 1986.

As a matter of law, Plaintiffs Hart, Hartzer, Howard, Kennon, and Vannice lost their first-hire rights on the dates they signed the Election of Severance Benefits and Waiver of Claims, thus resigning or voluntarily quitting. Any hiring done by United after those dates could not have violated these five Plaintiffs' rights under the ADA. United cannot be liable to Hart after October 8, 1986, to Hartzer after October 10, 1986, to Howard after October 14, 1986, to Kennon after October 10, 1986, or to Vannice after October 12, 1986.

Accordingly, United's Motion for Partial Summary Judgment is GRANTED as to Plaintiff Burger, Hart, Hartzer, Howard, Kennon, Mach, Mullins, Rankin, and Vannice.

II. *Defendant's Motion for Summary Judgment Against Plaintiffs Vannice, Hart, and Howard (withdrawn as against Bowdry), filed June 7, 1990.*

The Court determined in Defendant's Motion for Partial Summary Judgment above that Plaintiffs Hart, Howard, and Vannice lost their designated status on October 8, 1986, and October 12, respectively. The Court's determination that United shall not be liable to these three Plaintiffs after those respective dates is dispositive of this motion as well.

III. *Defendants' Motion for Summary Judgment Against Mach, Mullins, Burger, Bowdry, Vannice, Kennon, Hartzer, Russell Estill, and Ralph Estill, filed June 7, 1990.*

Defendant argues that these nine Plaintiffs are not entitled to first-hire rights because they failed to exercise those rights by not notifying United of their alleged designated status. Plaintiffs argue that notification is not required by the ADA or the regulations.

29 C.F.R. § 220.27 provides for a notice of rights as follows:

> Section 220.27 Notice of Rights.
>
> (a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with notice of rights in the form of a letter or other written documentation that such employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. . . .

The responsibilities of designated employees under the Airline Employee Protection Program regulations are set forth in pertinent part at Section 220.30, Designated Employees' Responsibilities:

> It is the responsibility of each designated employee to:
>
> (a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.
>
> (b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;
>
> (c) To provide a copy, *if requested*, of the notice of rights to a potential employing air carrier; and
>
> (d) To retain the original notice of rights for future use. (emphasis added)

On a motion for summary judgment, the Court cannot conclude that these nine Plaintiffs failed to properly exercise their first-hire rights. As the Court reads the regulations, a designated employee must provide a copy of the notice of rights to a potential employing air carrier, *if requested*. There are issues of fact remaining whether

United requested such information from these Plaintiffs. While the Court found *Long vs. TWA*, 913 F.2d 1262 (7th Cir. 1990) very interesting, it does not find *Long* to be dispositive of the issue presented by this motion. Accordingly, Defendant's Motion for Summary Judgment against Mach, Mullins, Burger, Bowdry, Vannice, Kennon, Hartzer, Ralph Estill, and Russell Estill is DENIED.

IV. *Defendant's Motion for Summary Judgment Re: Expiration of the Statute of Limitations Under the ADA, filed September 21, 1990.*

Defendant argues that a uniform federal six-month statute of limitations bars the ADA claims of Bowdry, Vannice, Russell Estill, and Ralph Estill. United argues that the six-month statute of limitations from the National Labor Relations Act, 29 U.S.C. § 160(b) or, in the alternative, a six-month statute of limitations drawn from the Colorado Labor Peace Act, Colo. Rev. Stat. § 8-3-110(16), or the Colorado Employment Practice Provisions, Colo. Rev. Stat. § 24-34-403, should apply. Plaintiffs argue that the Court should apply a two-year statute of limitations from either: (1) the Veterans Reemployment Rights Act, 38 U.S.C. § 2022, (2) the Civil Rights Act, 42 U.S.C. § 1981, (3) the Civil Rights Act, 42 U.S.C. § 1983, or (4) the Age Discrimination in Employment Act, 29 U.S.C. § 626 or, in the alternative, a two-year statute of limitations drawn from the state law "catchall provisions", Colo. Rev. Stat. § 13-80-102(g). Plaintiffs and Defendant agree that whatever statute of limitations applies begins to run when the Plaintiffs knew or should have known that their rights under the ADA were being violated. *See Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 420-21 (10th Cir. 1990).

Because Congress did not include a statute of limitations provision in the ADA, the Court must look to other sources to "borrow" the most suitable statute or other rule for a limitations period on ADA actions. *Agency*

Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 146-47 (1987); *Del Costello v. International Broth. of Teamsters*, 462 U.S. 151, 158 (1983). Courts have generally concluded that Congress intended the courts to apply the most closely analogous statute of limitations under state law. *Reed v. United Transp. Union*, 488 U.S. 319, 109 S.Ct. 621 (1989). Courts may decline to borrow a state statutes of limitations only when

> "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". *Del Costello* [462 U.S. 151, 172 (1983)].

Reed, 488 U.S. at ——, 109 S.Ct. at 625.

At least one court has applied the six-month statute of limitations found in the NLRA, 29 U.S.C. § 160(b), to claims under the employee protection provisions of the ADA. *See Bigelow v. Hawaiian Air Lines, Inc.*, 696 F.Supp. 1356 (D. Haw. 1987); *Gonzalez v. Aloha Air Lines, Inc.*, 669 F.Supp. 1023 (D. Haw. 1987). At least two other district courts have refused to apply § 160(b) and have looked to state statutes instead. *Crocker v. Piedment Aviation, Inc.*, 696 F.Supp. 685, 689-92 (D.D.C. 1988); *McDonald v. Piedmont Aviation, Inc.*, 695 F.Supp. 133, 135-38 (S.D.N.Y. 1988).

Because two Colorado statutes most analogous to the ADA contain the same time limitation as § 160(b), this Court need determine neither whether Congress intended federal or state time limitations to apply to ADA claims nor which federal statute is most analogous to the ADA. Both 29 U.S.C. § 160(b) and Colo. Rev. Stat. §§ 8-3-110 (1.6) and 24-34-403 provide for a six-month limitations period.

Assuming that Colorado law is the appropriate source for the limitation period on the Plaintiffs' claims, the

Court must determine which statutory provision is most analogous to the ADA. The only state statute urged by the Plaintiffs is the "catchall provision" of Colo. Rev. Stat. § 13-80-102(g). The Court's task is to borrow the most suitable statute. *Del Costello*, 462 U.S. at 158. The catchall provisions is not most analogous to the ADA and is thus inapplicable. *See Agency Holding Corp.*, 483 U.S. at 152-53; *Wilson v. Garcia*, 471 U.S. 261, 277 (1985). Therefore, the Court finds that the Colorado Labor and Employment statutes, Colo. Rev. Stat. §§ 8-3-110(6) and 24-34-403, are most analogous to the Plaintiffs' ADA claims. Accordingly, the Court concludes that the statute of limitations period for commencing the Plaintiffs' claims is six months.

The Court must next determine whether there is a genuine issue of material fact whether Bowdry, Vannice, and the Estills knew or should have known of the elements of their ADA claims more than six months before filing the action. The Court determines that genuine issues of fact remain regarding when these Plaintiffs knew or should have known of their ADA claims. Accordingly, the Defendant's Motion for Summary Judgment Re: Expiration of the Statute of Limitations under the ADA is DENIED because issues of fact remain as to when the Plaintiffs knew or should have known of their ADA claims.

V. *Defendant's Motion for Summary Judgment Against Plaintiff Bowdry, filed March 13, 1990.*

Because a recall would extinguish Bowdry's first-hire rights and he cannot remember whether he was recalled by Braniff, United argues that Bowdry cannont meet his burden of establishing that he was not recalled and summary judgment should be entered against him. In addition, United contends that Bowdry's damages are limited to the difference between the income he would have earned as a regular part-time ramp service employee from Janu-

ary 27, 1987 through February 10, 1988 and the income he earned during that time period as a regular part-time cabin serviceman. The Court, however, agrees with Bowdry's argument that genuine issues of fact remain regarding any recall of Bowdry by Braniff. Issues of fact also remain regarding Bowdry's damages, such as whether any non-designated applicants were hired into his occupational specialty before he was. Accordingly, the Defendant's Motion for Summary Judgment against Plaintiff Bowdry is DENIED.

VI. *Defendant's Motion for Summary Judgment Against Plaintiff Hart, filed August 20, 1990.*

United argues that Hart, in his employment application to United, indicated that he would accept only full-time employment. During the one-year period that Hart's application was kept on file at United, United did not hire any outside applicants into regular full-time customer service representative positions nor convert any temporary customer service positions to full-time status. United argues that, as a matter of law, Hart cannot establish that United hired anyone in violation of his rights under the ADA. Hart argues that there are issues of fact regarding whether United ever hires directly into full-time positions and whether United informed Hart of that policy.

The Court finds that factual issues remain concerning United's hiring policies for full-time positions. Accordingly, the Defendant's Motion for Summary Judgment against Plaintiff Hart is DENIED.

VII. *Defendant's Motion for Partial Summary Judgment Against Russell Estiill, filed March 13, 1990.*

United argues that both part-time and full-time positions are covered by 29 C.F.R. § 220.23(b) and that as of January 18, 1987, Russell Estill was hired into a job that complied with United's obligations under the Air-

line Employee Protection Program. Therefore, Russell Estill has no cognizable claim for damages and partial summary judgment should enter in favor of United finding that Estill's damages are zero.

Russell Estill argues that United's obligations to a designated employee do not cease completely when the employee is hired into a part-time position. Estill also argues that his damages depend upon whether any non-designated employee was hired before him or hired into a full-time position ahead of him once he had been hired. Estill introduces an affidavit indicating that at least one non-designated employee was so hired.

The Court finds that there are genuine issues of fact remaining concerning Russell Estill's damages claim. Accordingly, Defendant's Motion for Partial Summary Judgment against Russell Estill is DENIED.

VIII. *Defendant's Motion for Partial Summary Judgment against Ralph Estill, filed June 25, 1990.*

United argues that both part-time and full-time positions are covered by 29 C.F.R. § 220.23(b) and that United complied with all of its obligations under the Airline Employee Protection Program as of January 18, 1987. Therefore, Ralph Estill suffered no damages and partial summary judgment should enter in favor of United finding that Estill's damages are zero. Ralph Estill indicates that he has evidence of job openings for which he should have been hired prior to January of 1987.

The Court finds that there are genuine issues of fact remaining concerning Ralph Estill's damages claim. Accordingly, Defendant's Motion for Partial Summary Judgment against Ralph Estill is DENIED.

IX. *Plaintiffs' Motion to Bifurcate Proceedings, filed March 22, 1990.*

The Court hereby incorporates its oral Findings, Conclusions, and Order made in open court on December 21,

1990, whereby Plaintiffs' Motion to Bifurcate Proceedings was GRANTED. An initial trial shall be set on all liability issues, to be immediately followed by individual hearings as to each prevailing Plaintiff's damages.

X. *Plaintiffs' Motion to Supplement Complaint to Seek Additional Relief filed August 15, 1990.*

The Court hereby incorporates its oral Findings, Conclusions, and Order made in open court on December 21, 1990, whereby Plaintiffs' Motion to Supplement Complaint to Seek Additional Relief was DENIED.

XI. *Defendant's Motion to Strike Jury Demand, filed July 20, 1990.*

Defendant moves to strike the Plaintiffs' demand for a jury trial on the grounds that there is no express right to a jury trial under the ADA and no right to a jury trial under the Seventh Amendment because the relief sought by the Plaintiffs and provided by the ADA is purely equitable in nature. Plaintiffs argue that the ADA is most akin to the ADEA, where claimants are entitled to a jury trial.

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Courts have consistently interpreted the phrase "suits at common law" to mean suits in which legal rights were to be determined, as opposed to those where equitable rights alone were recognized and equitable remedies were administered. *Granfinanciera, S.A. v. Nordberg*, —— U.S. ——, 109 S.Ct. 2782 (1989). The Seventh Amendment question depends upon the nature of the issue rather than on the character of the overall action. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). To determine whether a particular action will resolve legal (as opposed to equi-

table) rights, such that the plaintiff is entitled to a jury trial, courts must examine both the nature of the issues involved and, more importantly, the remedies sought. *Local No. 391 v. Terry*, —— U.S. ——, 110 S.Ct. 1339 (1990) (Justice Marshall with the Chief Justice and two Justices joining and two Justices concurring in judgment). Characterizing the relief sought is more important than finding a precisely analogous common law cause of action in determining whether the Seventh Amendment guarantees a jury trial. *Tull v. U.S.*, 481 U.S. 412, 417-18 (1987). If the claim is essentially equitable rather than legal, there is no constitutional right to a trial by jury. *Granfinanciera*, 109 S.Ct. at 1500.

The Court agrees with United that the ADA does not provide an express right to a jury trial and that the relief sought by the Plaintiffs (injunctive and declaratory relief, instatement into their rightful positions, seniority adjustments and compensation, back pay, lost benefits) is equitable in nature. The Court cannot go so far as to say that any award of monetary relief must necessarily be legal relief. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). The presence of monetary damages in this action does not make it more analogous to a legal action to an equitable action. *Local No. 391 v. Terry*, —— U.S. ——, 110 S.Ct. at 1359 (Kennedy, J., O'Connor, J., Scalia, J., dissenting). Plaintiffs are not entitled to a jury trial. Defendant's Motion to Strike Jury Demand is GRANTED.

DATED this 18th day of January, 1991.

BY THE COURT:

/s/ Daniel B. Sparr
Judge
United States District Court

APPENDIX C

STATUTES

49 U.S.C. app. § 1552 (1988). Employee protection program.

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds, upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amout of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining pursuant to the maximum provided in subsection (e) of this section.

(c) Assistance for relocation

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on

October 24, 1978, shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this Appendix. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employe in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been deprived of employment shall be made each month until the receipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shill be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stat-

ing that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

(h) Definitions

For the purposes of this section—

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this Appendix. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this Appendix, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act

of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

REFERENCES IN TEXT

The Airline Deregulation Act of 1978, referred to in subsec. (h)(2), is Pub. L. 95-504, Oct. 24, 1978, 92 Stat. 1705, as amended. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 1301 of this Appendix and Tables.

CODIFICATION

Section was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by section 1551 of this Appendix, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

For transfer of certain enforcement functions of the Secretary or other official of the Department of Transportation relating to compliance with this chapter and the authorizations and regulations issued thereunder to the Federal Inspector, Office of Federal Inspector of the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 1301 of this Appendix.

29 U.S.C. § 158(a)(3) (1988). National Labor Relations Act

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as

provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

* * * *

29 U.S.C. § 160 (1988). National Labor Relations Act

§ 160. Prevention of unfair labor practices—Powers of Board generally

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom

such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

* * * *

Colorado Rev. Stat. § 13-80-102:

13-80-102. General limitation of actions—two years. (1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:

(a) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract;

(b) All actions for strict liability, absolute liability, or failure to instruct or warn;

(c) All actions, regardless of the theory asserted, against any hospital, health care facility, clinic, physician, nurse, dentist, chiropractor, veterinarian, practitioner, therapist, technician, midwife, pharmacist, optometrist, podiatrist, paraprofessional, or other person involved in any of the healing arts;

(d) All actions for wrongful death;

(e) Repealed, L. 87, p. 567, § 8, effective July 1, 1987.

(f) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided pursuant to article 14 of title 24, C.R.S.;

(g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;

(h) All actions against any public or governmental entity or any employee of a public or governmental entity, except as otherwise provided in this section or section 13-80-103;

(i) All other actions of every kind for which no other period of limitation is provided;

(j) All actions brought under section 42-6-208, C.R.S.

Colorado Rev. Stat., §§ 8-3-106, -108(1)(a), -110(1), -110 (16): Colorado Labor Peace Act

8-3-106. Rights of employees. In accordance with the provisions of this article, employees have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own free choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Each employee also has the right to refrain from any of such activities. The rights of each employee are essential rights, and nothing contained in this article shall be so construed as to infringe upon or have any operation against or in conflict with such rights.

8-3-108. What are unfair labor practices. (1) It is an unfair labor practice for an employer, individually or in concern with others, to:

(a) Interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in section 8-3-106;

* * * *

8-3-110. Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the division in the manner and with the effect provided in this article; but nothing in this article shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this article before the division have not been exhausted.

* * * *

(16) The right of any person to proceed under this section and section 8-3-121 shall not extend beyond six months from the date of the specific act or unfair labor practice alleged.

Colorado Rev. Stat. § 24-34-402(a), -403: Colorado Employment Practice Provisions

24-34-402. Discriminatory or unfair employment practices. (1) It shall be a discriminatory or unfair employment practice:

(a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of handicap, race, creed, color, sex, age, national origin, or ancestry; but, with regard to a handicap, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the handicap, the handicap actually disqualifies the person from the job, and the handicap has a significant impact on the job;

* * * *

24-34-403. Time limits on filing of charges. Any charge alleging a violation of this part 4 shall be filed with the commission pursuant to section 24-34-306 within six months after the alleged discriminatory or unfair employment practice occurred.

REGULATIONS

Part 220—AIRLINE EMPLOYEE PROTECTION PROGRAM

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Appendix I—U.S. Carriers certificated as of October 23, 1978 under Section 401 of the Federal Aviation Act of 1958, as amended.

Authority: Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1750-1753 (49 U.S.C. 1552).

(Secretary's Order No. 1-79, 44 FR 13093)

Subpart A—Purpose and Scope of the Airline Employee Protection Program

§ 220.01 Definitions.

As used in this Part, unless the content otherwise indicates:

(a) "Act" means the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705.

(b) "Air Carrier" means an air carrier certificated under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

(c) "Center" means the entity or location which from time to time may be designated by the Secretary to receive, maintain and distribute the job listing information required by this Part.

(d) "Corporate officer" means an individual who holds any officer's position established pursuant to the Articles of Incorporation or bylaws of any air carrier, or who is otherwise identified as an officer by any air carrier, in filings with the Federal Aviation Administration, Civil Aeronautics Board or Securities and Exchange Commission or in any reports to stockholders or any pubic communications of an air carrier.

(e) "Covered air carrier" means an air carrier which was certificated prior to October 24, 1978 (A listing of such carriers appears as an appendix to these regulations).

(f) "Designated employee" means a protected employee who meets the eligibility requirements set forth in Section 220.10.

(g) "Effective period" means the period commencing on the effective date of these regulations and ending on the later of: (1) October 23, 1988, or (2) the last day of the final month in which the Secretary is required to make a payment under Section 43 of the Act; except that nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978, and the effective date of these regulations.

(h) "Eligibility period" means the ten-year period beginning on October 24, 1978.

(i) "Employment relationship" means an attachment to a covered air carrier which includes, but is not limited to, compensated service, furlough, leave, or strike.

(j) "Equal employment opportunity requirement" means a specific equal employment requirement, pursuant to a federal court or administrative order, consent decree, or conciliation agreement, requiring that named individuals or specific members of a class are entitled to relief by virtue of the carrier's unlawful employment discrimination.

(k) "Occupational specialty" means the class, craft, or field of endeavor in which an individual was employed at the time of separation from a covered air carrier or in which the employee was employed during the 12 months immediately preceding the date of separation.

(l) "Protected employee" means a person other than a member of the Board of Directors or corporate officer of a covered air carrier:

(1) Who had an employment relationship with a covered air carrier on October 24, 1978, and

(2) Who on October 24, 1978, had four years of employment or four years accrued seniority with a single covered air carrier. The term employee shall include any full or part-time employee other than an employee in seasonal or temporary employment as defined herein. As used herein four years of employment shall mean not less than 48 months (whether or not consecutive) in which the employee actually completed the minimum number of hours of regular employment required for such employee's craft, class or position under the then applicable requirements of the employing carrier.

(m) "Seasonal employment" means employment during limited periods of the year due to peak market conditions or other factors which are periodic in nature, and in positions which do not confer seniority or recall rights.

(n) "Secretary" means the Secretary of Labor of the United States.

(o) "Temporary employment" means employment of limited duration which does not confer seniority or recall rights.

(p) "Terminated," means, unless expressly provided to the contrary, termination of employment, other than for cause.

(q) "Terminated for cause" means the separation of an individual from employment initiated by an air car-

rier for violation of such carrier's rules, policies, procedures, or practices pertaining to employee standards of conduct, job performance, or dependability.

(r) "Vacancy" means an employment opportunity other than seasonal or temporary employment, which an air carrier seeks to fill from outside its existing or furloughed work force.

§ 220.02 Purpose.

Section 43(d) of the Act provides a first-right-of-hire for designated employees of covered air carriers. The regulations in this Part are issued to effectuate section 43(d)(1) and (2) of the Act (hereinafter referred to as the Rehire Program).

§ 220.03 Scope.

(a) The Rehire Program is applicable only to designated employees, as more fully set forth herein, and only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program. The Secretary of Labor will also publish a comprehensive list of jobs available with air carriers.

§ 220.04 Responsibilities of the Secretary of Labor.

The Secretary of Labor is responsible for administering the Rehire Program, and the Assistant Secretary for Labor-Management Relations, Labor-Management Services Administration (LMSA), has been delegated responsibility for the following:

(a) The development and promulgation of policies, regulations and procedures covering the first-right-of-hire provisions of Section 43(d)(1) of the Act;

(b) The development and promulgation of policies, regulations, and procedures covering the comprehensive job list required under Section 43(d)(2) of the Act; and

(c) The establishment and implementation of reporting requirements for air carriers to obtain pertinent in-

formation necessary for fulfilling the Secretary's responsibilities under Section 43(d)(2) of the Act.

Subpart B—Designated Employees' Eligibility and Rights

§ 220.10 Eligibility requirements.

(a) To qualify as a designated employee eligible for rights under this Part 220, an applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(1) Retired voluntarily;

(2) Was required to retire by virtue of reaching the mandatory retirement age, if any, established by a covered air carrier or as prescribed by any government agency with regulatory authority over a covered air carrier;

(3) Retired due to a disability;

(4) Is on strike or is withholding services in support of other Employees who have struck the covered air carrier;

(5) Is terminated for cause as defined in § 220.01;

(6) Resigned or voluntarily quit for any reason.

(c) A designated employee who is recalled by his former carrier is no longer eligible under this section to exercise the first-right-of-hire. Such a person may become a designated employee in the future due to a subsequent termination or furlough which occurs on or prior to the expiration of the eligibility period.

§ 220.11 Designated employees' rights.

(a) A designated employee shall have a first-right-of-hire in such employee's occupational specialty, regardless

of age, with any covered air carrier hiring additional employees; *Provided, however,* That each designated employee must satisfy all qualifications or other requirements established by the hiring carrier (subject to the limitations contained in Section 220.21) and must make a timely application in accordance with normal carrier procedures for any particular job vacancy.

(b) A designated employee hired by any covered air carrier pursuant to the provisions of the Act shall not be required, as a condition of employment, or in any other manner, to relinquish, waive, or forfeit any seniority or recall rights which such person may possess with any other air carrier; *Provided, however,* That the provisions of this part shall not be deemed to create or prolong any such seniority or recall rights.

Subpart C—Carriers' Responsibilities

§ 220.21 Duty to hire.

(a) Subject to § 220.24, a covered air carrier shall have the duty to hire a designated employee, regardless of age, who otherwise meets the qualification requirements established by such carrier before it hires any other applicant when such carrier is seeking to fill a vacancy in the designated employee's occupational specialty from outside its work force. As used herein "work force" shall include all present employees and any furloughed or terminated employees who, at the time of furlough or termination, possessed recall or seniority rights.

(b) Subject to the provisions of § 220.24, a covered air carrier shall not fill a vacancy, which would otherwise be available to a designated employee, by promoting or reassigning a seasonal or temporary employee, *unless* such seasonal or temporary employee is a designated employee.

(c) When considering applications from more than one designated employee for a particular vacancy, a covered

air carrier shall be entitled to offer employment to any such designated employee in its absolute discretion.

§ 220.21 Criteria for Employment.

(a) A covered air carrier shall be entitled to apply any prerequisites or qualifications determined by it for any vacancy, except that, solely with respect to the duty to hire created by the Act, a covered air carrier shall not be entitled to limit employment opportunities for designated employees on the basis of:

(1) Initial hiring age (provided that such prohibition shall not be applicable to retirement ages applicable to all of any class or craft of such air carrier's employees); or

(2) The existence of any seniority, recall rights or previous experience with any other air carrier; *Provided, however,* That covered air carriers shall be entitled to require prospective employees to disclose the existence of any such seniority or recall rights in making application for employment and to take the existence or nonexistence of such rights into account in selecting from among those qualified designated employees who have applied for a particular job vacancy.

(b) In filling job vacancies during the effective period, covered air carriers shall be entitled to require applicants to furnish evidence that they are designated employees.

§ 220.22 Listing a vacancy.

(a) During the effective period all air carriers shall be required to list each vacancy with the Center at the earliest practicable time, and to include with such listing a statement as to whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filing the vacancy. In addition, any air carrier shall be entitled to list anticipated vacancies with the Center at any time.

§ 220.23 Content of vacancy listing.

Air carriers shall provide the Center with a description for each job listing, which shall include, but need not be limited to, the following—

(a) Job title;

(b) Type of position (full or part-time);

(c) Salary;

(d) Basic qualifications and/or training requirements;

(e) Brief description of duties;

(f) Location of vacancy (if known);

(g) Special requirements such as type rating, licensing, skill requirements, etc.;

(h) Whether the vacancy is subject to the duty to hire;

(i) Information on how to apply, such as contact person, mailing address, and any special application procedures; and

(j) Whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy.

§ 220.24 Filling a vacancy.

(a) A covered air carrier may fill a vacancy with a designated employee at any time after a vacancy has been listed with the Center.

(b) A covered air carrier may fill a vacancy with someone who is not a designated employee after the vacancy has been listed with the Center for at least 30 calendar days; if

(1) No designated employee with the requisite occupational specialty has applied for the vacancy in accordance with § 220.30 within that time;

(2) No designated employee who did apply within that time period meets the carriers' criteria for employment as set forth in § 220.21; or

(3) The vacancy is subject to an equal employment opportunity requirement and the carrier cannot satisfy such equal employment opportunity requirement by hiring a designated employee.

(c) A covered air carrier may fill a vacancy on a temporary basis with someone who is not a designated employee while the carrier is considering applications for the vacancy which were received from designated employees during the listing period.

(d) The date of the listing shall be the date on which the listing is received by the Center.

§ 220.25 List of protected employees.

(a) Within 60 calendar days of the effective date of these regulations, each covered air carrier shall provide the Secretary with a list of all protected employees who were employed by it on October 24, 1978.

(b) The list shall contain the following information:

(1) Protected employee's name;

(2) Social Security number (if available); and

(3) Current occupational specialty for present employees or occupational specialty at the time of separation from employment for former employees.

(c) Not later than 90 calendar days after the effective date of these regulations, each covered air carrier shall provide a onetime notice to each employee with an employment relationship with the carrier on October 24, 1978, stating whether or not the carrier has determined that employee to be a protected employee within the meaning of these regulations, and if so that the carrier has reported his or her name to the Secretary. Employees

who are determined to be not protected shall be advised of their rights to appeal.

(2) Employees who dispute the carrier's determination of protected status may submit evidence of their status to the covered air carrier within 60 calendar days of receiving the notice required by paragraph (c)(1).

(3) The covered air carrier shall consider the evidence submitted by the employee and shall inform the employee of its final determination within 15 calendar days of the submission of evidence. In the event the carrier determines that the employee qualifies as a protected employee, it shall forward the information required by paragraph (b) of this section to the Secretary.

§ 220.26 Appeals to the Secretary.

(a) If the employee disagrees with the carrier's final determination under § 220.25 that he or she is not a protected employee within the meaning of this part, the employee (or his or her designated representative with express authorization) may appeal such determination to the Secretary within 60 calendar days of the carrier's final decision under § 220.25(c)(3) or the date when such decision was required.

(b) An appeal must be written, dated, and signed by the employee. It must set forth:

(1) The full name, address, and telephone number of the employee;

(2) The full name and address of the carrier making the determination; the full name of the individual(s) who made the determination for the carrier and the date of that determination;

(3) A summary of the pertinent events and circumstances concerning the employee's status and the basis of the disagreement, including the original date of hire,

date of all periods of furlough, leave or termination, and copies of relevant documents; and

(4) Such other information as may be required by the Labor-Management Services Administration (LMSA).

(c) Any appeal hereunder may be filed with any office of the LMSA, (LMSA Area offices are listed as an appendix to these regulations). Upon receipt, an appeal will be forwarded to an LMSA Regional Office where the Regional Administrator will make a preliminary review of the appeal, and if warranted, request information from the parties or conduct such other investigation as may be required. If the matter cannot be resolved informally, the Regional Administrator will forward the file to the Secretary for review.

(d) If upon review of an appeal hereunder the Secretary determines that further action is not appropriate, he will so advise the parties. If upon review of the entire record the Secretary determines that the employee qualifies for protected status, the Secretary will take appropriate steps to add the employee's name to the list of protected employees and will so notify the parties.

§ 220.27 Notice of Rights.

(a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with a notice of rights in the form of a letter or other written documentation that such employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. Such notice of rights shall include, but not be limited to the following information:

(1) Name;

(2) Social Security number (if available);

(3) Occupational specialty;

(4) Date of furlough or termination;

(5) An official of the covered air carrier who can verify the individual's status as a designated employee; and

(6) Signature, name, and location of the certifying official.

(b) As soon as practicable, but not later than 60 calendar days following the effective date of these regulations, each covered air carrier shall make a reasonable effort to provide the notice of rights required in paragraph (a) of this section to any designated employee who was furloughed or terminated by such carrier on or after October 24, 1978, and prior to the effective date of these regulations and who has not been recalled to employment by such covered air carrier.

(c) A covered air carrier shall provide a verified true copy of the notice of rights to a designated employee who has lost his or her original copy.

§ 220.28 Air carrier actions to be reported to the Secretary.

(a) A covered air carrier shall report to the Secretary:

(1) The names and Social Security numbers (if available) of all designated employees hired by it, and

(2) The filling of any vacancy with other than a designated employee. With respect to any occurrences reported under paragraph (a)(2) of this section, the report of the covered air carrier shall contain the job number assigned to that vacancy by the Center, the date of hire, and a certification by a corporate officer that the carrier complied with the provisions of this part and that no qualified designated employee with the requisite occupational specialty applied in a timely manner.

(b) Two copies of the reports required by this section shall be filed with the Secretary covering the six-month periods ending June 30 and December 31 of each calendar year in which these regulations are in effect and shall be submitted within 60 calendar days of the end of the reporting period.

§ 220.29 Equal Employment Opportunity.

(a) Where a covered air carrier is under an equal employment opportunity requirement, the covered air carrier shall, to the extent possible, satisfy this equal employment obligation by hiring qualified designated employees.

(b) Where a covered air carrier is under an equal employment opportunity requirement and cannot satisfy such requirement by hiring from the pool of qualified designated employees, the carrier may meet its equal employment requirement by hiring non-designated employees. *Provided, however,* That this provision shall not change or reduce the responsibilities of carriers in regard to the hiring procedures required by §§ 220.21, 220.22, 220.23, and 220.24.

Subpart D—Designated Employees' Responsibilities

§ 220.30 Designated employees' responsibilities.

It is the responsibility of each designated employee to:

(a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.

(b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;

(c) To provide a copy, if requested, of the notice of rights to a potential employing air carrier, and

(d) To retain the original notice of rights for future use.

Subpart E—Department of Labor's Responsibilities

§ 220.40 Comprehensive job list.

(a) The Secretary shall establish a Center to maintain a comprehensive listing of all vacancies listed by air carriers in accordance with §§ 220.22 and 220.23.

(b) The Center will be accessible by telephone throughout the United States to facilitate the listing or modifying of vacancy information by air carriers.

(c) The Center shall provide an air carrier with an identifying number for each vacancy listed on the comprehensive listing.

(d) The comprehensive listing shall be compiled, published and distributed to each local office of the State Employment Security Agencies on a periodic basis as determined necessary by the Secretary, and it shall be distributed to such other individuals or organizations as may desire to receive copies thereof in accordance with criteria established by the Secretary from time to time.

§ 220.41 List of protected employees.

The Secretary shall establish and publish a list of protected employees as reported by covered air carriers under § 220.25. A copy of this list shall be sent to all covered air carriers as soon as available.

Subpart F—Administration

§ 220.50 Effective period of the program.

(a) *Beginning date.* (1) The requirements set forth in this part shall be effective 60 legislative days from publication of these regulations (A legislative day is defined

by the Act as a calendar day when both Houses of Congress are in session).

(2) The Department shall publish a notice in the Federal Register announcing the actual effective date.

(b) *Ending date.* This program and these regulations terminate on the last day of the effective period.

(c) Nothing in this Part shall affect the rights and duties of protected employees and covered air carriers under the Act prior to the effective date of this Part.

§ 220.51 Disclosure of information.

The Department of Labor shall make available to covered air carriers and to designated employees or their authorized representatives, all reports, certifications, or lists collected under this Part, to the extent permitted by the Privacy Act (5 U.S.C. 552a) and the Department's regulations issued pursuant to that Act (29 CFR Part 70a).

Appendix I—U.S. Carriers Certificated as of October 23, 1978, Under Section 401 of the Federal Aviation Act of 1958, as amended

(Annotations Reflect Operating Status as of October 25, 1985).

1. Airlift International, Inc.
2. Air Micronesia, Inc.
3. Air Midwest
4. Air New England, Inc. (*1*)
5. Air Wisconsin, Inc.
6. Alaska Airlines, Inc.
7. Allegheny Airlines, Inc. (*2*)
8. Aloha Airlines, Inc.
9. American Airlines, Inc.

10. Aspen Airways, Inc.
11. Braniff Airways, Inc. *(1)*
12. Capitol International Airways, Inc. *(3)*
13. Chicago Helicopter Airways, Inc.*
14. Colonial Airlines, Inc. *(1)*
15. Continental Air Lines, Inc.
16. Delta Air Lines, Inc.
17. Eastern Airlines, Inc.
18. Evergreen International Airlines, Inc.
19. The Flying Tiger Line, Inc.
20. Frontier Airlines, Inc.
21. Hawaiian Airlines, Inc.
22. Hughes Air Corp.* *(4)*
23. Kodiak Western Alaska Airlines, Inc.
24. Mackey International Airlines, Inc.*
25. McCulloch International Airlines, Inc.
26. Midway Airlines, Inc.
27. Midway (Southwest) Airways Co.
28. Modern Airways, Inc. *(1)*
29. Munz Northern Airlines, Inc.
30. National Airlines, Inc.* *(5)*
31. New York Airways, Inc.*
32. North Central Airlines, Inc.* *(4)*
33. Northwest Airlines, Inc.
34. Overseas National Airways, Inc. *(6)*
35. Ozark Air Lines, Inc.

36. Pan American World Airways, Inc.
37. Piedmont Aviation, Inc.
38. Reeve Aleutian Airways, Inc.
39. Rich International Airlines, Inc.
40. Seaboard World Airways, Inc.* (7)
41. Southern Air Transport, Inc.
42. Southern Airways, Inc.* (4)
43. Texas International Airlines, Inc.
44. Trans International Airlines, Inc. (8)
45. Trans World Airlines, Inc.
46. United Airlines, Inc.
47. Western Air Lines, Inc.
48. Wein Air Alaska, Inc.
49. World Airways, Inc.
50. Wright Air Lines, Inc.
51. Zantop International Airlines, Inc.

* No longer holds certificate.

(1) Holds certificate, but not operating.

(2) Renamed U.S. Air, Inc.

(3) Renamed Capitol Air, Inc.

(4) Merged in to Republic Airlines, Inc.

(5) Merged into Pan American World Airways, Inc.

(6) Ceased operations in September 1978.

(7) Merged into Flying Tiger Line, Inc.

(8) Renamed Transamerica Airlines, Inc.

LEGISLATIVE MATERIAL

Senate Report No. 631, 95th Cong., 2d Sess., 113-17 (1978)

[**Senate Report at 113**]

The Committee believes that enactment of this regulatory reform bill will increase the total number of jobs in the airline industry. The purpose of the bill is to create a more competitive environment through an easing of entry restrictions and increase in pricing flexibility. Because the elasticity of demand for airline service is relatively high in many markets, the lower fares inherent in a more competitive industry should lead to an increase in the number of airline passengers. This increase, as well as the greater number of competitors that would result from less restricted market entry, should lead to additional airline flights. More passengers and flights would necessarily entail expanded overall employment opportunities.

Nevertheless, it is true that after enactment of this bill the airlines for the first time will be principally responsible to market forces rather than government regulation. Airlines will undoubtedly differ in their ability to succeed in the new market oriented environment. The Committee does not believe that this difference in competitive ability will cause system contractions, but rather different levels of growth. There is certainly a possibility, however, that one or more airlines will encounter such difficulties in adjusting that they will lose enough traffic to cause a major reduction in their total labor force.

The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. The Committee felt that this concern should not be ignored and that careful consideration of the question of employee protection programs was warranted. The

Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.

The fundamental reason why this regulatory reform bill should include an employee protection program is that for 40 years the U.S. airline industry has been regulated in all of its most economically significant aspects, including entry, exit, and pricing. This regulation has protected from competition the fares and routes of certificated airlines, thus protecting their traffic and revenue as well. An airline's traffic and revenue is of course the key to its economic well-being—and its need for and ability to pay employees. Regulation has, therefore, had the effect of reducing the potential for major employment reductions in individual airlines (at the same time, however, reducing potential increases not only in each airline but in the industry as a whole).

An additional aspect of the regulatory system which has had protectionist value to employees has been that certificates have become extremely valuable as a result of entry restrictions. Because of the value of their certificates, airlines in serious financial difficulty have without exception been able to merge with stronger airlines, thereby avoiding bankruptcy or substantial system contraction. A statutory condition for merger has been CAB approved. Such approval has been forthcoming only if the merger agreement contained a satisfactory program for employee protection.

[**Senate Report at 114**]

Airline employees have relied on the present regulatory system through their reliance on the conditions which have resulted from that system. They have relied directly in their decision to enter the industry and indirectly through their acceptance of compensation and work rules which have been negotiated within the context of the regulatory system and the job security it was thought to offer.

A crucial element of the present bill is the gradual phasing in of its key provisions. The Committee accepted without controversy the principle that a transition period should be provided to airline companies in order to allow them time for adjustment before the full force of the new regulatory system is felt. However, an individual employee will be able to do little to adjust to the new structure. Many airline employees have given most of their working lives to the air transportation industry and have too much invested to leave it now. In many cases, a job shift even within the industry would be costly because of lost seniority. Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.

As already stated, the Committee has determined that the public interest will be best served by a more competitive system in which airline management has greater discretion with respect to routes and prices. Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

Critics of the employee protection program argue that airline employees are no more deserving of protection against dislocations resulting from regulatory reform than employees in any other area of private industry who may be harmed as a result of Government actions (such as cancellation of a Government contract or estab-

lishment of pollution or occupational safety standards) that have adverse effects on their employers. The Committee disagrees. The air transportation industry is one of the few industries in the United States which is so comprehensively regulated, and thus immune from normal market forces. It is because of the past decisions of Congress to require such regulation that the present air transportation system has developed as it has. In order to conduct their operations, the airline companies had no choice but to comply with these regulations. This forced compliance led to a justifiable reliance on the stability of the regulatory structure. The Committee believes that Congress, having acted to prevent the normal free market evolution of the industry, now has a duty to the industry and its employees which would not exist if such action had not been taken. In order for Congress responsibly to change its policy now and require the industry to move toward a much more competitive market oriented environment, Congress should attempt to minimize the dislocations caused by the change. The change in policy and the temporary dislocations it may cause would not be [**Senate Report at 115**] necessary if Congress had not left in place so long a regulatory framework designed for the conditions that existed in the 1930's.

These considerations do not apply when a Government contract is cancelled or when Congress changes the general legal background of competitive industries, such as by enacting new pollution standards. No company can reasonably rely on the renewal of a Government contract any more than it could rely on the renewal of a contract with a private buyer. Cancellation of a contract by Government or any other economic entity imposes no special responsibilities or duties outside the dictates of applicable contract law. A company is not required to enter into Government contracts. Similarly, a company cannot reasonably assume that the general legal environment within which it must do business will not change, and certainly not that all the physically dam-

aging effects of a business on the persons and property of others will not eventually be restricted by statute.

Another concern expressed to the Committee is the fear that its employee protection program would set an unfavorable precedent for future legislation. The Committee believes that an employee protection program is justified only in very special circumstances. As indicated, the Committee concluded that the particular features of the airline industry and the regulated environment in which it has existed since 1938 make a temporary transitional assistance program appropriate. The appropriateness of such programs for future regulatory reform legislation must be examined on a case by case basis.

The Committee believes that the increased vitality of the airline industry, with the accompanying increased employment opportunities, that will result from enactment of this bill will alleviate a good deal of anxiety and opposition to similar regulatory reform efforts in the future.

The alternatives are clear: continued regulation and thus a continuing economic loss to the public, versus decreased regulation and, therefore, decreased loss to the public, potentially paid for by a temporary assistance program.

Features of the employee protection program

The employee protection program fashioned by the committee limits as much as possible the potential expenditure of Government funds, while providing a comprehensive program of protection for dislocated employees.

In order to be eligible for assistance an employee must have at least 4 years full-time experience with a certificated airline as of the date of enactment. These protected employees would then be eligible for monetary compensation in the event of job loss, relocation, or reduction in wages suffered in connection with a bank-

ruptcy or "major contraction" of their employer which occurred within the first 10 years of enactment and which was in major part caused by the change in the regulatory structure brought about by the act as determined by the Board.

The requirement for 4 years experience is included because the committee believes that employees with 3 years or less seniority have not relied to a substantial enough degree on the present system to warrant protection. They have made less of a commitment to a particular airline and would suffer fewer difficulties and hardships in shifting to new employment.

[**Senate Report at 116**]

The 10-year period was selected because it is during such period that the airlines will be making most of their adjustments to the new system. Carriers will be rationalizing their route structures and establishing fares for the first time in an environment relatively unfettered by regulatory constraints. Because of the particular transitional provisions in the bill (for example, some automatic entry protection phases out in 3 years, the remainder in 5 years, and section 406 subsidy will phase out in 7 years), by the end of the 10-year period the carriers' competitive capabilities will have been tested and the successes or failures of adjustments to the new climate demonstrated.

A "major contraction" is defined as a reduction by at least 15 percent of the total number of full-time employees of the employing carrier occurring within a 12-month period. Strike-related reductions will not be counted for this purpose. The 15-percent figure was chosen as the lowest figure consistent with the desire to avoid CAB determinations of causality with respect to dislocations caused by normal economic fluctuations. In the last 20 years, there have been only a few non-strike-related instances when the 15-percent level has been exceeded. The 15-percent test was chosen not only in order to reduce the number of CAB investigations, but also because the com-

mittee felt that assistance should only be made available if the employing carrier were in major financial difficulty. Otherwise, the protection offered in the collective bargaining agreement should be relied upon. Any particular reduction of less than 15 percent would, nevertheless, constittue a major contraction if the Board determined that other reductions were likely to occur such that the test would be satisfied. This provision is intended to give displaced workers in clear cases the ability to receive assistance without their having to wait a full year before becoming eligible.

Under the program, each regulated air carrier is required to give priority hiring to displaced employees who satisfy the eligibility requirement as described above. Thus, few such employees would be without work for a long period of time. In addition if compensation payments began, the Secretary of Labor would be required to periodcially publish a list of available jobs in aeronautics and related industries. Employees receiving compensation payments would be required to accept "reasonably comparable" employment or else lose a portion of their benefits, except that if the new job required relocation, the employee could elect not to relocate but would receive benefits for a shorter period. The provisions are intended to place on the employees the reasonable requirement of seeking and accepting available employment while still providing assistance where necessary. The interaction of these provisions will decrease the cash payments required under the program.

Eligible employees who list their jobs would be entitled to monthly assistance payments for a maximum of 3 years or until they were reemployed, whichever occurred first. The amount of such payment would be equal to a percentage of former wages, as determined by regulations promulgated by the Department of Labor. These regulations will be subject to congressional review. The committee considered setting statutory percentage figures

and maximum dollar amounts, but concluded that the Secretary of Labor, after consultation with the Secretary of Transportation, will be in a better position to determine [**Senate Report at 117**] the appropriate amounts. The committee intends that the percentages chosen will result in compensation payments that are less than the employees' after-tax income in order to preserve maximum incentives for employees to secure comparable work.

An eligible employee suffering a reduction in wages, would be entitled to receive a percentage of the decrease in wages, as set forth in regulations of the Department of Labor, determined pursuant to the preceding paragraph. Again, the maximum payment period is 3 years, except that the total number of monthly assistance payments—the payments for unemployment together with the payments for reduced wages—could not exceed 36. An eligible employee required to relocate would be entitled to reasonable moving and living expenses as well as compensation for any loss incurred on the sale of a residence, cancellation of a contract to purchase a residence, or cancellation of such employee's lease.

* * * *

Proposed Regulations: Airline Employee Protection Program

Department of Labor, March 30, 1979,
44 Fed. Reg. 19146, 19150-51.

§ 638.14 Disputes concerning first right of hire.

(a) *Complaints.* A complaint alleging that the first right of hire has been denied to a protected employee or eligible protected employee by a carrier may be filed by that protected, or eligible protected employee.

(b) *Contents of complaint.* A complaint must be written, dated, and signed and should set forth:

(1) The full name and address of the carrier against whom the complaint is directed;

(2) The full name and address of the carrier with whom the complainant was last employed and the date on which the complainant was furloughed or terminated by such carrier;

(3) A summary of the pertinent events and circumstances surrounding the alleged failure or refusal to hire the complainant, including the particular occupational specialty or job sought, the full name of the individual(s) who represented the carrier, and the date on which the complainant was denied employment; and

(4) The full name, address, and telephone number (printed) of the complainant.

(c) *Filing and service of the complaint.* (1) The complaint shall be filed with the Area Administrator of the Labor-Management Services Administration (LMSA) in whose area the alleged violation occurred. (LMSA Area offices and their respective jurisdictions are listed as an appendix to these regulations).

(2) In the event that two or more complaints involving the same job vacancy are filed in different Area

Offices of the LMSA, the cases shall be consolidated and investigated by the Area Administrator in whose area the alleged violation occurred.

(3) A complaint must be filed within 90 calendar days of the alleged denial of the first right of hire.

(4) The Area Administrator will serve the named carrier with a copy of the complaint.

(d) *Investigation of complaint.* (1) After a complaint has been filed with an Area Office, the Area Administrator will make a preliminary review of the complaint, and if warranted, will conduct an independent investigation.

(2) The Area Administrator will prepare and submit to the LMSA Regional Administrator a report of investigation, with recommendations.

(3) If the LMSA Regional Administrator determines that a reasonable basis in support of the complaint has been established, the parties will be encouraged to enter into a voluntary settlement of the dispute and will be assisted in such effort by the LMSA.

(4) If the parties agree upon and implement a voluntary settlement, the case will be closed.

(5) If the parties fail to reach a voluntary settlement within a reasonable time, and the LMSA Regional Administrator determines that a voluntary settlement is unlikely, the LMSA Regional Administrator will prepare a report of his findings in the case and submit this report of findings to the Assistant Secretary for LMSA for appropriate action.

(e) *Dismissal or withdrawal of complaint.* (1) The LMSA Regional Administrator, upon review of the report of investigation, may authorize the Area Administrator to request the complainant to withdraw the complaint if it is determined that;

(i) The complaint has not been timely filed;

(ii) A reasonable basis for the complaint has not been established by the investigation; or

(iii) Other appropriate reasons warrant such action.

(2) A complainant may file a written request to withdraw the complaint previously filed. Such withdrawal request, whether initiated by the complainant or submitted in response to a request by the Area Administrator, shall be approved by the LMSA Regional Administrator. Upon approval, the case shall be closed and the complainant shall have no right to file an appeal to the Assistant Secretary for LMSA.

(3) If the complainant does not withdraw the complaint, as requested, with a reasonable time, the LMSA Regional Administrator may dismiss the complaint. The letter of dismissal shall set forth a summary of the facts revealed by the investigation and the reasons for the dismissal.

(f) *Rights of Appeal.* (1) If the complaint is dismissed by the LMSA Regional Administrator, the complainant may file a written appeal with the Assistant Secretary for LMSA. The appeal must be filed within 15 days of the date of receipt of the LMSA Regional Administrator's letter of dismissal and shall set forth the grounds upon which the appeal is based. The Assistant Secretary for LMSA shall notify the LMSA Regional Administrator and the carrier involved of the filing of the appeal.

(2) Upon review by the Assistant Secretary for LMSA, the appeal may be sustained or denied, in whole or in part, or other action may be directed by the Assistant Secretary as deemed appropriate, the Assistant Secretary for LMSA will notify in writing the complainant, the carrier involved, and the LMSA Regional Administrator of the disposition of the appeal.

SUPREME COURT, U.S.
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No. 91-2069

In the
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED AIRLINES, INC.

Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MEMORANDUM IN OPPOSITION

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August 20, 1992

QUESTIONS PRESENTED

1. Assuming that the question is properly before the Court, did the court of appeals err by adhering to the normal rule of borrowing a limitations period from state law to govern actions under a law that does not contain a statute of limitations, and if not, what is the proper federal statute to apply?

2. If use of the most closely analogous state statute of limitations was required, was the court of appeals correct in selecting the state statute governing cases under federal statutes that do not include an express limitations period?

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OCTOBER TERM, 1991

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UNITED AIRLINES, INC.

Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MEMORANDUM IN OPPOSITION

STATEMENT

Respondents Paul Hart, Milton Howard, and Dane Vannice were employed by Frontier Airlines, Inc, until it ceased operations and filed for bankruptcy in August, 1986. At various times between November, 1987, and August, 1988, respondents applied for employment with petitioner United Air Lines, Inc., but were not hired. On September 8, 1989, respondents joined an already-pending lawsuit that had been filed by several other former Frontier employees in the United States District Court for the District of Colorado, and that alleged that United had failed to hire them in violation of section 43 of the Airline Deregulation Act of 1978, 29 U.S.C. App. § 1552. That section sought to cushion

the anticipated effects of the deregulation of the airline industry, which was expected to lead to substantial losses of employment, by, *inter alia*, requiring the remaining airlines to grant a temporary hiring preference for certain employees. Respondents and the other plaintiffs alleged that United had hired persons who did not enjoy section 43 protection instead of themselves, thus violating their first-hire rights.

Petitioner moved for summary judgment on a number of grounds, including that 13 of the 14 plaintiffs had lost their section 43 protections when they failed to accept status on a preferential hire list with Continental Airlines under a "Job Preservation Agreement" ("JPA") between Frontier and Continental, but instead accepted cash payments under the JPA. Petitioner also sought summary judgment against six of the plaintiffs, including respondent Vannice, on statute of limitations grounds; it did not, however, seek summary judgment on that ground against the remaining plaintiffs, including respondents Hart and Howard. Petitioner acknowledged that the Deregulation Act had no limitations period, but argued that the court should borrow the six-month limitations period provided by section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), for filing an unfair labor practice charge with the National Labor Relations Board. In the alternative, it argued that, if the court adhered to the rule that limitations periods are normally borrowed from state law, then the six-month period for filing administrative charges with state agencies under the Colorado Labor Peace Act or the Colorado Employment Practice Provisions should be used. Petitioner argued, among other things, that because Congress knew that the preferential hiring rights would expire in 1988, it must have intended that there be a short limitations period so that all claims under section 43 would be resolved soon thereafter.

The district court granted summary judgment on the ground that the plaintiffs (including all three respondents) had lost their claim to protection under section 43 by electing to receive cash payments rather than employment with Continental. Appendix to the Petition for Writ of Certiorari ("Pet. App.") 18a-21a. Addressing the limitations issue that had been raised with respect to respondent Vannice, the district court agreed that a six-month

limitations period was the most appropriate, but denied summary judgment on that ground because there was a genuine issue of fact regarding when respondent Vannice and others knew or should have known of their section 43 claims. *Id.* 23a-25a.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit, arguing that they were protected under section 43, that the JPA governed their rights only against Frontier and Continental, and that their acceptance of cash benefits under the JPA simply mitigated their damages, and did not waive their protected status. Their brief also expressed disagreement with the district court's opinion about the six-month limitations period. Petitioner both defended the district court's JPA ruling and argued that the district court's discussion of the six-month limitations issue was interlocutory in nature and did not result in dismissal of respondents' claims, and so the court of appeals "need not address this issue." United Ct. App. Br. 15. It did not argue that summary judgment should be affirmed for limitations reasons as an alternate ground. Nevertheless, petitioner set forth its views on the limitations issue so that they could be considered "if this court were to review the District Court's decision regarding the applicable statute of limitations." *Id.*

The court of appeals reversed. It first decided that respondents had not lost their first-hire rights by opting for the cash payment option instead of the job waiting list option under the JPA. Pet. App. 4a-10a. It then turned to the statute of limitations issue, which it deemed a "not insignificant matter," *id.* 10a, albeit only for a limited time, because section 43 contains a "sunset provision that will eventually make the question moot." *Id.* n.4.

On the merits of the limitations issue, the court recited the well-established principle that, when Congress does not include a limitations provision in a federal statute, the strong presumption is that Congress intended the courts to look to analogous state limitations periods "unless they frustrate or significantly interfere with federal policies." *Id.* 12a, *quoting Reed v. UTU*, 488 U.S. 319, 327 (1989). Agreeing with the decisions of the Second and Ninth Circuits in *McDonald v. Piedmont Aviation*, 930 F.2d 220, 225 (2d Cir. 1991), and *Gonzalez v. Aloha Airlines*, 940 F.2d 1312 (9th Cir.

1991), the court stated first that there was no reason to depart from the usual rule in this situation. It rejected petitioner's contention that a national company like itself needs a limitations period of uniform length in every state in order to be able to calculate its contingent liabilities, reasoning that "[i]f this rationale were adopted there would hardly be occasion to adopt the state statute of limitations" for any federal statute. Pet. App. 13a. The court also decided that the Colorado two-year residual statute of limitations for federal claims under statutes that do not include an express limitations period was the best one to adopt, because at least one legislature had made the judgment that two years was the time period that best balanced one group of citizens' interest in enforcing their rights against another group's interest in repose. *Id.* 15a.

Petitioner has sought certiorari only on the limitations issue, and has abandoned the JPA issue in this Court.

REASONS FOR DENYING THE WRIT

I. The Limitations Issues on Which the Petition is Based (a) Do Not Present Significant Issues of Federal Law Because the Federal Cause of Action Is About to Expire Under Its Sunset Provision, (b) Are Not Properly Presented Here, and (c) in Any Event Involve an Unexceptional Application of Settled Principles in the Limitations Area About Which There Is No Significant Conflict Among the Lower Courts.

a. Petitioner asks the Court to grant certiorari in this case to consider the proper limitations period to borrow for claims brought by furloughed airline employees to enforce their first-hire rights under section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1552. The principal reason why this case does not warrant review is that the issue is about to go away. As the court of appeals noted, Pet. App. 10a n.4, and as petitioner concedes, Pet. 3 n.3, section 43(d) gives first-hire rights only to employees who were terminated before October 24, 1988. More-

over, even those employees may exercise their rights for only six years after that date, *i.e.*, before October 24, 1994. § 43(b), (e), (j).

Petitioner suggests that the issue may remain alive because bills have been introduced in Congress to extend these furlough rights; what petitioner does not mention is that such bills have been introduced for years, and that, although they have passed the House in the past, the President has routinely threatened to veto them, and the Senate has never acted on them. And in this Congress, even the House Committee has not reported them out.

If, on the other hand, Congress does pass such legislation, there is no reason to believe that the questions that the petition purports to present will need to be addressed by the Court. First, Congress might address the limitations issue in the new legislation, thus avoiding the need for the federal courts to borrow a limitations period from any other source. And, if Congress fails to speak to the issue, the limitations issue for persons covered by the extension will presumably be controlled by the Judicial Improvements Act of 1990, 28 U.S.C. § 1658, which provides that, when a federal statute is enacted after 1990 without an express statute of limitations, a four-year limitations period automatically applies.

No doubt, for statutes enacted earlier than 1991, the Court will continue to wrestle with the more general issue of how to decide which limitations period should be borrowed, when to borrow state or federal periods, and when to employ a uniform characterization of the cause of action. But the Court should choose cases in which there is a genuine, continuing controversy, whose resolution will affect the application of a heavily used statute, not a statute like section 43 which applies to only one industry and which is about to expire.

b. Even if the debate regarding the proper limitations periods for section 43 cases were sufficiently important to warrant the Court's review, this case would not be the right vehicle for resolving that question because the issue is not properly before the Court. Although both the district court and the court of appeals expressed views on that question of law, in neither court

did the resolution of the issue bear on the judgment issued by the Court, for two reasons. First, petitioner did not even move for summary judgment on limitations grounds against respondents Hart and Howard. Because petitioner did not put respondents Hart and Howard on notice that judgment might be granted against them on that ground, petitioner could not argue for affirmance on that alternate ground as to them in the court of appeals. After all, a summary judgment cannot be affirmed on a ground that the judgment winner did not raise in the district court. *Fountain v. Filson*, 336 U.S. 681, 683 (1949).

Second, the district court did not grant summary judgment even against the one respondent, Vannice, against whom summary judgment **was** sought on limitations grounds, because, notwithstanding his view of the law, the district judge found a genuine issue of fact about when respondent Vannice knew or should have known of petitioner's violation. Thus, the validity of a six-month period would not have been a ground for affirmance. Although respondents, who were not then represented by their counsel of record in this Court, did raise the limitations issue in their brief as appellants, they had no need to do so, because there was no final judgment against them on that ground. Either they were asking for an advisory opinion, or anticipating that petitioner might ask for affirmance on this ground. But petitioner did not ask for such an affirmance, and expressly acknowledged that the district court's expression of views on the proper limitations period "was interlocutory in nature." United Ct. App. Br. at 15. Accordingly, the question of what limitations period applied to respondents may not have been properly before the court of appeals, and petitioner has no basis for seeking review in this Court of the part of that court's opinion that expressed its views on the proper limitations period.

c. Nor, finally, should certiorari be granted on the theory that there have been widespread disagreements among the lower courts over section 43, or that the decision below departed from this Court's precedents. In trying to argue that the decision below conflicts with a single court of appeals ruling and "a majority of district courts," petitioner relies largely on a few district court decisions in the Ninth and Tenth Circuits which have been

overruled by their respective circuits. Pet. 11-12 n.10. Indeed, petitioner cites no district court decision of continuing validity that conflicts with the decision below. As the law now stands, the Courts of Appeals for the Second, Ninth and Tenth Circuits, joined by the District Court for the District of Columbia, have all rejected the proposition that a single federal limitations period should be borrowed for section 43 claims, and have all borrowed state limitations periods of two or three years.* Only the Third Circuit, affirming a district court decision to the same effect, has opted to look to federal law and borrow the six-month limitations period of section 10(b) of the NLRA. *Haggerty v. USAIR*, 952 F.2d 781 (3d Cir. 1992). Given both the limited amount of disagreement among the lower courts, and the small number of reported decisions that have even had to address the issue in the fourteen years since section 43 was enacted, there is simply no basis for the Court's making a place on its docket to decide the proper limitations period for a cause of action that has less than two years of effectiveness left.

There is also no basis for petitioner's contention that the lower court departed from this Court's settled precedents on the method of selecting limitations periods. Petitioner first contends that the Tenth Circuit erred in concluding that this Court's precedents provide for the adoption of a uniform statute of limitations to govern claims under a federal statute only when that statute encompasses causes of action of many types and concerning numerous topics, such that different limitations periods might be applicable, even within the same state, to different claims under the same statute. Petitioner acknowledges that this reason, which has no bearing in this case, was the basis for choosing a uniform characterization in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991), but it argues that there is another reason to seek uniformity: the need of a defendant that operates nationally to predict the time period after each refusal to hire an employee when it is protected against legal

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* *Gonzalez v. Aloha Airlines*, 940 F.2d 1312 (9th Cir. 1991); *McDonald v. Piedmont Aviation*, 930 F.2d 220 (2d Cir. 1991); *Crocker v. Piedmont Aviation*, 696 F. Supp. 685, 690-692 (D.D.C. 1988), *rev'd on other grounds*, 933 F.2d 1024 (D.C. Cir. 1991).

challenges to that hiring decision. Pet. 20.

But it is petitioner that is confused about the type of "uniformity" that is considered desirable in certain cases under this Court's limitations analysis. The Court has said that uniformity is desirable, not because a defendant is entitled to a time period that does not vary from state to state, but because all litigants, and the courts themselves, have an interest in avoiding lengthy wrangles over which limitations period ought to be selected in a particular case. Where claims under a single statute, such as RICO or 42 U.S.C. § 1983, may be based on a number of different fact patterns, each of which might evoke a different analogy to state or federal causes of actions, a court faced with a limitations question will never be sure which analogy should be followed for which subcategory of a single federal cause of action. This uncertainty, in turn, inevitably breeds litigation which increases the time and energy needed to resolve the merits of the claim. Thus, the first question in choosing a statute of limitations to be borrowed is to decide, not whether uniformity of time period is desirable, but whether uniformity of characterization of all claims under that statute is desirable. That is what the Court said in *Lampf*, and that is what it said in its other recent limitations cases. *Reed v. UTU*, 488 U.S. 319, 326 (1989); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147, 149-150 (1987); *Wilson v. Garcia*, 471 U.S. 261, 271-275 (1985).

Petitioner does not point to a single decision of this Court, or even of any lower court apart from the Third Circuit's section 43 decision in *Haggerty v. USAIR*, *supra*, holding that the "uniformity" portion of the borrowing analysis refers to the amount of time, rather than the characterization of a cause of action. Indeed, if it were a uniform amount of time that were desirable, because national defendants need to avoid uncertainty based on the different jurisdictions in which they operate, the result would be that a federal limitations period would **always** have to be borrowed.

The court below ably described this flaw in petitioner's analysis. Pet. App. 13a. Different states regularly differ in the amount of time they allow for bringing the same sort of state

causes of action; only federal limitations periods are uniform throughout the country, and yet state statutes of limitations are routinely borrowed for federal claims against defendants who operate in more than one jurisdiction. Only by choosing federal statutes could the Court ensure that claims under a particular federal statute always expire in the same amount of time regardless of the jurisdiction in which the violation was committed or in which the plaintiff lives. But such a strong presumption in the direction of borrowing from federal law would stand on their head the repeated statements by this Court in its recent limitations decisions that, in labor law as in other areas of the law, borrowing from state law is to be the norm, and borrowing from federal law the rare exception. *Id.* 14a, *quoting DelCostello v. Teamsters*, 462 U.S. 151, 171 (1983). Indeed, Congress' enactment of a four-year statute of limitations for all federal causes of action, but only on a prospective basis, 28 U.S.C. § 1658, makes clear that it is satisfied with the general use of state law for existing causes of action under this Court's well-established analysis, on which the court below relied.

But even if petitioner were correct both that a uniform characterization were appropriate, and that federal law was the appropriate source for borrowing because there was no appropriate state law analogy, that would not justify petitioner's solution of borrowing from the period of time provided by the NLRA for filing an administrative charge with the National Labor Relations Board. After all, section 43 applies only to airline employees, and labor relations in the airline industry is governed, not by the NLRA, but rather by the Railway Labor Act ("RLA"). 45 U.S.C. §§ 151 *et seq.* The RLA, in turn, has its own limitations period, and unlike NLRA section 10(b), the RLA's limitations period is two years. Section 3, First (r), 45 U.S.C. § 153, First (r). It is true that, when Congress extended the RLA to the airline industry, it did not apply section 3 of the RLA, which created the National Railroad Adjustment Board, but rather enacted separate sections, §§ 204 and 205, 45 U.S.C. §§ 184 and 185, so that the airlines would have their own separate boards of adjustment. Nevertheless, some courts have held that the two-year limitations period of section 3 First (r) applies to actions by and against airlines as well. *E.g.*, *Flight Attendants v. Republic Airlines*, 797 F.2d 352, 356-357

(7th Cir. 1986); *contra, e.g., Machinists v. Aloha Airlines*, 790 F.2d 727, 734-735 (9th Cir. 1986). In the alternative, following petitioner's suggestion that section 43 is most comparable to Colorado's age discrimination statute because one aspect of the Deregulation Act "proscribes hiring decisions on the basis of age," Pet. 29, *citing* section 43(d)(1), the best federal analogy might be to the two-year limitations period prescribed by Congress for claims under the Age Discrimination in Employment Act. 29 U.S.C. § 626(e)(1). Therefore, if the Court grants certiorari to review the decision below, respondents will argue that, if a uniform federal period is to be borrowed, it is one of these two-year periods, not the six-month period provided in the NLRA, that is appropriate, and that the judgment of the court of appeals should be affirmed on that ground.

II. The Question About What State Limitations Period Is Most Analogous Raises No Issue of Importance, and Petitioner Points to No Conflict Regarding the Ruling Below.

Petitioner also asks the Court to grant review in order to decide whether, even if the court below correctly to looked state rather than federal law for an appropriate analogy, it erred by borrowing the residual period provided by the Colorado legislature for federal causes of action that do not include an express statute of limitations. However, petitioner does not point to a single decision of any federal court -- apart from the District of Colorado in a section 43 case that has, of course, now been superseded by the decision of the Tenth Circuit here -- that rejects the use of such a residual limitations period for **any** cause of action. Indeed, petitioner identifies only four states that have such a residual period, Pet. 21, and the lower courts have routinely borrowed those states' limitations periods to govern a variety of federal causes of action. *E.g., Guy v. Swift & Co.*, 612 F.2d 383, 385 (8th Cir. 1980) (borrowing Neb. Rev. Stat. § 25-219 for actions under 42 U.S.C. § 1981); *Duncan v. Southwest Airlines*, 838 F.2d 1504, 1508 (9th Cir. 1987) (borrowing Haw. Rev. Stat. § 657-11 for fair representation action filed before *DelCostello* decision, which is not retroactive in Ninth Circuit); *C&W Constr. Co. v. Carpenters Local 745*, 687 F. Supp. 1453, 1460 (D. Haw. 1988) (borrowing

Haw. Rev. Stat. § 657-11 for LMRA section 303 secondary boycott action). Nor is any authority cited for the proposition that, in borrowing from state law, it is appropriate to borrow the time allowed for seeking assistance from a state administrative agency, as opposed to filing a lawsuit in state court.

Even petitioner does not claim that there is disagreement among the lower courts concerning the second question presented, and, in any event, petitioner's disagreements with the analysis of the court below simply do not rise to the level of a question of federal law of sufficient importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 91-2069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED AIRLINES, INC.,
Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2069

UNITED AIRLINES, INC.,
Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

United Airlines, Inc.* hereby submits this Reply Memorandum in support of its Petition to this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 13, 1992.

ARGUMENT

I. THE ISSUES PRESENTED FOR REVIEW ARE NOT "ABOUT TO GO AWAY", AS RESPONDENTS CONTEND, NOR ARE THE ISSUES "NOT PROPERLY PRESENTED HERE"

Respondents contend that the "principal reason" why this Court should not grant certiorari "is that the [statute of limitations] issue is about to go away." (Resp. Brf. at 4.) As Respondents acknowledge, however, airline industry employees may exercise their first-hire

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* As required by Rule 29.1 of this Court, petitioner has listed its parent companies, subsidiaries and affiliates in its Petition for Writ of Certiorari.

rights under Section 43(d) of the Airline Deregulation Act, 49 U.S.C. App. § 1552(d) (1988), until October 24, *1994*—hardly a situation that "is about to go away." Moreover, employees who contend their Section 43 rights have been violated may, depending on the appropriate limitations rule and when their claims accrue, challenge an air carrier's failure to hire them well *after* October 24, 1994. Thus, Federal courts will continue to struggle with the question raised in this Petition.

Respondents also speculate that Congress "might address the limitations issue in the [pending] legislation." (Resp. Brf. at 5.) However, none of the bills pending in Congress to expand the class of employees subject to first-hire rights under Section 43(d) addresses the statute of limitations issue. H.R. 3171, 102d Cong., 1st Sess. (1991); S. 1565, 102d Cong., 1st Sess. (1991).[1]

Respondents next contend that the issue of the appropriate statute of limitations applicable to Section 43(d) may not have been properly before the court of appeals, even though Respondents raised the issue to the court of appeals and the Tenth Circuit ruled on this issue. Respondents are incorrect since the district court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, entered an order of *final* judgment as to all three Respondents (1a-2a).[2] Upon appeal of a final judgment, an

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[1] The Judicial Improvements Act of 1990 ("JIA") is also inapplicable to these bills. (Resp. Brf. at 5.) The JIA applies a uniform four-year federal statute of limitations to "a civil action arising under an Act of Congress *enacted after* [December 1, 1990]." 18 U.S.C. § 1658 (emphasis added). Section 43(d), however, was enacted by Congress in *1978*; the bills pending before Congress only purport to expand the class of employees who can bring a civil action under Section 43(d).

[2] On January 31, 1992, the district court entered an order of final judgment in favor of United and against Hart, Howard, and Vannice (1a). On February 6, 1992, the district court entered a judgment of dismissal on Respondents' claim (3a). Citations to material printed in the annexed appendix appear as "——a".

appellate court has jurisdiction under 28 U.S.C. § 1291 to hear any of the district court's rulings. Even rulings that are interlocutory in nature are merged into the final judgment. *Matter of Xonics, Inc.*, 813 F.2d 127, 130-131 (7th Cir. 1987); *Elfman Motors v. Chrysler Corp.*, 567 F.2d 1252, 1253 (3d Cir. 1977); *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, 474 (10th Cir.), *cert. denied*, 429 U.S. 823 (1976).[3] As to Respondent Vannice, the statute of limitations ruling, while interlocutory in nature, became reviewable upon entry of a final judgment against him.[4]

In short, the court of appeals had jurisdiction to decide the statute of limitations issue.

II. RESPONDENTS MISUNDERSTAND UNITED'S ARGUMENT ABOUT THE CONFLICT BETWEEN THE TENTH CIRCUIT'S DECISION AND DECISIONS OF THIS COURT

Respondents completely mischaracterized United's argument that the Tenth Circuit misapplied the set of inquiries formulated by this Court for ascertaining whether state or federal borrowing is more appropriate. United does not contend, as Respondents claim, that the issue is "whether uniformity of time period is desirable." (Resp.

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[3] The district court also certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (2a). Therefore, even assuming there was no final judgment, the court of appeals accepted the district court's certification of the issue under 28 U.S.C. § 1292(b) when it decided the statute of limitations question.

[4] But if Respondents are *correct* that the Tenth Circuit did *not* have jurisdiction to decide the issue of the applicable statute of limitations, even though it was Respondents who first raised and briefed the issue to the court of appeals, then under their theory this Court should *vacate* that portion of the Tenth Circuit's opinion addressed to the statute of limitations. *See Liberty Mutual Insurance v. Wetzel*, 424 U.S. 737, 740 (1976). In *Liberty Mutual*, this Court, on its own motion, held that the court of appeals did not have jurisdiction over an interlocutory appeal and vacated the judgment of the court of appeals. *Id.* at 746.

Brf. at 8.) Rather, as United demonstrated in its Petition, the threshold inquiry is whether a uniform characterization of a federal statute better promotes the *federal interests* in predictability, judicial economy, and best fits the statute's remedial purpose. (Pet. at 18.) Contrary to the Tenth Circuit's view, this Court has *never* suggested that only federal causes of action involving diverse factual circumstances should be characterized uniformly for borrowing purposes. (Pet. at 18.) Respondents' confusion over the proper analysis demonstrates why Supreme Court intervention is necessary here.

Respondents also contend that if federal law is the appropriate source for borrowing, other federal laws should be borrowed. (Resp. Brf. at 9-10.) Respondents suggest the two-year limitations rule under the Railway Labor Act ("RLA"), 45 U.S.C. § 153, First (r). That limitations rule applies only to a petition to the district court to review an order of an RLA Adjustment Board. *Id.* Such claims are not even marginally analogous to a Section 43 claim. *Id.*[5] Respondents also offer the two-year limitations period under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq*—a limitations rule that was deleted from the ADEA as of November 21, 1991 by the 1991 Civil Rights Act. Pub. L. No. 102-166 § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C § 626(e) (Supp. 1992)). Moreover, in order to preserve an ADEA claim an employee must *first* file a charge of employment discrimination within 180 days (or 300 days in a deferral state) after the alleged employment practice occurred. 29 U.S.C. § 626(d)(1) (1988). If the ADEA is a more appropriate borrow-

[5] The more analogous claim under the RLA, which Respondents ignore, is a claim for wrongful discharge for protected union activity. 45 U.S.C. § 152, Fourth. For such claims courts have applied a six-month statute of limitations, borrowed from Section 10(b) of the National Labor Relations Act. *See Robinson v. Pan American World Airways*, 777 F.2d 84, 89 (2d Cir. 1985).

ing source, the 180-day statute of limitations should be applied.

This Court should grant review to resolve the confusion in the Circuits and to assure that its borrowing rules are applied correctly by the federal courts.

III. THE TENTH CIRCUIT'S TEST FOR BORROWING A STATE LIMITATIONS RULE IS CONTRARY TO SUPREME COURT PRECEDENT

Respondents ignore United's argument that the court of appeals, in mechanically borrowing a state residual limitations period for "all actions upon liability created by a federal statute," Colo. Rev. Stat. § 13-80-102(1)(g), disregarded the fundamental state-law borrowing principles of this Court which require federal courts to borrow the limitations rule for the most analogous state *cause of action* similar to the federal cause of action at issue. *See Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *see also Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The court of appeals neither examined the essential nature of a Section 43 claim nor explained why a Colorado residual statute is somehow the most analogous state limitation period.

Respondents contend that it is appropriate for a federal court to borrow a state residual limitations period for a federal statute, and rely on three federal court cases which do so. (Resp. Brf. at 10-11.) These cases—adopting a state residual limitations period for causes of action under § 301 of the Labor Management Relations Act ("LMRA"),[6] 42 U.S.C. § 1987, and § 303 of the LMRA[7]—have either been overruled or have been called into question by other circuits. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (for claims under *42 U.S.C. § 1981*, this Court applied state limitations

[6] 29 U.S.C. § 185.

[7] 29 U.S.C. § 187.

period governing *personal injury* actions); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 165 (1983) (for claims under LMRA § 301, this Court applied the six-month *federal* statute of limitations contained in the LMRA); *Carruthers Ready-Mix v. Cement Masons Local Union*, 779 F.2d 320, 325 (6th Cir. 1985) (for claims under LMRA § 303, declined to follow earlier precedent which applied state residual statute of limitations and instead applied 3-year statute of limitations for actions for inducement of breach of contract and unlawful interference with a business relationship).[5]

This Court should review the decision of the court of appeals because its decision not only creates confusion in the circuits, but its analysis disregards the fundamental state-law borrowing principles to which this Court has long adhered.

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[5] Respondents cite *C&W Constr. Co. v. Carpenters Local 745*, 687 F. Supp. 1453, 1460 (D. Haw. 1988), to support the proposition of borrowing a residual statute of limitations to claims under § 303 of the LMRA. The court in *C&W* only applied the residual statute of limitations to cases arising prior to this Court's decision in *DelCostello*. *Id.* at 1459. For cases after *DelCostello*, the court said that a six-month federal statute of limitations under the LMRA would apply. *Id.*

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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Dated: August —, 1992

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 88-S-1997

CHARLES BOWDRY, *et al.*,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

ORDER

[Filed Jan. 31, 1991]

THIS MATTER comes before the Court on Plaintiffs' Motions and Legal Authority for Order Certifying Issues for Immediate Appeal, for Amendment of Previous Orders, and for Stay of Litigation Pending Appeal.

First, Plaintiffs request amendment of this Court's January 18, 1991 Order to reflect that it was a final order of judgment as to Plaintiffs Vannice, Hart, and Howard. Plaintiffs also request certification for immediate appeal of (1) the issue of first hire rights under the Job Preservation Agreement, found at pages 1 through 5 of the Court's Order and (2) the issue of the statute of limitations for claims under the Airline Deregulation Act, found at pages 7 through 9 of the Court's Order.

Pursuant to Fed. R. Civ. P. 54(b), when more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more

but fewer than all of the parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The Court hereby determines that there is no just reason for delay and directs entry of judgment on the January 18, 1991 Order as to Plaintiffs Vannice, Hart, and Howard.

Next, pursuant to 28 U.S.C. § 1292(b), the Court is of the opinion that its January 18, 1991 Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. The Court hereby certifies for immediate appeal: (1) the issue of first hire rights under the Job Preservation Agreement, found at pages 1 through 5 of the Court's Order and (2) the issue of the statute of limitations for claims under the Airline Deregulation Act, found at pages 7 through 9 of the Court's Order.

In light of this certification and in the interests of justice, all proceedings in the district court are hereby STAYED.

DATED at Denver, Colorado, this 31st day of January, 1991.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-S-1997

CHARLES BOWDRY, *et al*,
Plaintiffs,

v.

UNITED AIR LINES, INC.,
Defendant.

AMENDED JUDGMENT

[Filed Feb. 6, 1991]

Pursuant to and in accordance with the Memorandum Opinion and Order signed by the Honorable Daniel B. Sparr on January 18, 1991 and with the Order signed on January 31, 1991 it is

ORDERED that defendant United's motion for partial summary judgment is GRANTED as to Plaintiff, Bob Berger, Paul Hart, James Hartzer, Milton Howard, Rich Kenon, Loren Mach, Glenn Mulline, Norman Rankin, Dane Vannice as to the issue of first hire rights, it is

FURTHER ORDERED that defendants motion for summary judgment against plaintiffs, Dane Vannice, Paul Hart, and Milton Howard is GRANTED and it is

FURTHER ORDERED that judgment of dismissal to enter in favor of the defendant, United Air Lines and against the plaintiffs, Dane Vannice, Paul Hart, Milton Howard, it is

FURTHER ORDERED that this case be and are hereby dismissed as to Dane Vannice, Paul Hart, Milton Howard.

Dated at Denver, Colorado this 6th day of February, 1991.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

/s/ Shephen Ehrlich
STEPHEN EHRLICH,
Chief Deputy Clerk